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Enhancing Recovery—A Claims Primer

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Introduction

On 19 November 1995, Congress passed the 1996 Legislative Appropriations Act, which contained, inter alia, authority for the Comptroller General to transfer to the Office of Management and Budget numerous functions, including the authority to decide carrier appeals of offsets taken by the military claims services on personnel property claims. The Office of Management and Budget further delegated this authority to the Defense Office of Hearings and Appeals, a branch of the Defense Legal Services Agency, Department of Defense (DOD).[2]

While this transfer of decision-making authority removed the Comptroller General from deciding carrier appeals, it did not negate the precedential power of prior Comptroller General decisions in this important area. These decisions will serve as a standard for subsequent similar cases. Based on this premise, this primer seeks to identify several issues which carriers continue to raise to defeat a field claims office's demand for monetary recovery for loss and/or damage to a servicemember's personal property. This article will also suggest actions a field claims office can take to counter a carrier's denial of payment.

Discussion

Before addressing specific carrier challenges to demand requests, the preliminary question every claims judge advocate or claims examiner must ask and answer is, "has the Army claimant (the shipper) established a prima facie case of carrier liability?" In *Missouri Pacific Railroad Co. v. Elmore & Stahl,*[3] the United States Supreme Court held that for a shipper to meet this requirement, the shipper must show three things: (1) tender of the goods to the carrier in a particular condition; (2) delivery of the goods in a more damaged condition [or no delivery at all]; and (3) amount of damages.[4] "Moreover, when goods pass through the custody of more than one bailee [e.g., a carrier or a warehouse], it is a presumption of the common law that the damage [or loss] occurred in the hands of the last one."[5] A carrier's allegation that the shipper caused the damage to claimed items subsequent to delivery is not sufficient to shift the burden from the carrier.[6]

If the shipper successfully establishes a prima facie case of carrier liability, the burden then shifts to the carrier to prove that the damage to, or loss of, personal property did not occur while the property was in the carrier's custody or that the damage or loss can be attributed to one of five exceptions to carrier liability.[7] A claims judge advocate's or claims examiner's first step is to gather the most complete claims packet possible from the claimant. Properly completed and substantiated claims forms, starting with DD Form 1840R, Notice of Loss or Damage, usually withstand challenge by a carrier.

Notice—DD Forms 1840/1840R

Notice and Later-Discovered Loss or Damage. The Joint Military-Industry Memorandum of Understanding on Loss and Damage (MOU) provides that a carrier must accept written documentation advising the carrier of later-discovered losses or damages and that such documentation is evidence which overcomes the presumption of correctness of the delivery receipt, so long as the agency dispatches this documentation no later than seventy-five days after the carrier has completed delivery.[8]

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1. I thank Ms. Phyllis Schultz for her comments and guidance.

2. Patriot Forwarders, Inc., Claims Appeals Board, Claims Case No. 96070217 (Nov. 19, 1996) ("Pursuant to Public Law No. 104-53, November 19, 1995, effective June 30, 1996, the authority of the GAO to adjudicate carrier's reclaims of amounts deducted by the Services for transit loss/damage was transferred to the Director, Office of Management and Budget who delegated this authority to the Department of Defense.").

3. 377 U.S. 134 (1964).

4. *Id.* at 138.

5. Towne Int'l Forwarding, Inc., Comp. Gen., B-260768 (Dec. 28, 1995); Stevens Transp. Co., Comp. Gen., B-243750 (Aug. 28, 1991).

6. Andrews Van Lines, Comp. Gen., B-270638 (May 21, 1996) (The shipper moved personal property from the garage to the house after delivery, and the carrier argued that the shipper was the "last handler."); Stevens Worldwide Van Lines, Inc., Comp. Gen., B-251343 (Apr. 19, 1993) (The shipper moved personal property from Alabama to Florida, but the carrier failed to inspect.); Interstate Van Lines, Inc., Comp. Gen., B-197911.3 (Feb. 2, 1990) (The shipper moved personal property within the home after delivery.).

7. *See* McNamara-Lutz Vans and Warehouses, Inc., 57 Comp. Gen. 415, 418 (Apr. 18, 1978). The five exceptions are: (1) act of God, (2) public enemy, (3) act of shipper, (4) act by public authority, and (5) inherent vice or nature of the goods. *Id.*

In *Senate Forwarding, Inc.*,[9] the Comptroller General held that the dispatch date, not the date postmarked on the envelope, controlled.[10] This decision allows the field claims office to dispatch the DD Form 1840R as late as the seventy-fifth day after delivery and not lose the presumption because the Army postal system did not mail it on that same day. However, "[t]o avoid needless litigation on this issue, a [field] claims office should mail each DD Form 1840R promptly on the date indicated on the bottom of the form. Moreover, the office should avoid sending multiple DD Forms 1840R with different dates in the same envelope."[11] To do otherwise only invites challenge by the carrier, and it becomes difficult for the field claims office to argue timely dispatch for any of the forms contained in the envelope. Additionally, the practice of sending multiple DD Forms 1840R with different dispatch dates in the same envelope is contrary to United States Army Claims Service (USARCS) instructions, and field claims office SOPs should reflect the requirement for separate envelopes.

Continuation Sheets. If a claimant has completed the DD Form 1840R and has additional items to identify, claims personnel must ensure that the claimant uses a continuation sheet to note the additional damage or loss. The reverse side of the form (*i.e*., the DD Form 1840 side) should *not* be used to complete the listing of additional items. "Erroneously noting loss or damage on the wrong side of either the DD Form 1840 or DD Form 1840R, however, does not necessarily preclude carrier recovery for those items."[12] Field claims personnel should also ensure that each continuation sheet is signed and dated by the appropriate claims person, just as was done on the original DD Form 1840R.

Carrier's Failure to Complete the DD Form 1840/1840R. In *National Forwarding Co.*,[13] the Comptroller General held that an agency has the responsibility to make a reasonable effort to find the carrier's address instead of holding the DD Form 1840/1840R until the seventy-five day time period expires.[14] In upholding the carrier's appeal of no timely notice, the Comptroller General found that National had included its name, the government bill of lading number, and the address of National's agent. The Army could find the correct address and timely dispatch the DD Form 1840R with minimal difficulty.[15] On the other hand, the Comptroller General has also held that Army field claims offices are not required to make an effort to discover a carrier's address and to timely dispatch the DD Form 1840R when the carrier fails to provide any information on the DD Form 1840/1840R.[16] The best practice for field claims offices is to determine the responsible carrier and to dispatch timely notice whenever possible. This approach should eliminate challenges on this issue, avoid what would otherwise be an offset action, and hopefully result in a quicker settlement of the demand.[17]

The Army's Failure to Complete the DD Form 1840R. In *Patriot Forwarders, Inc.*,[18] the new Claims Appeals Board held that the government's failure to complete the DD Form 1840R by omitting the carrier's address in block 3a, did not negate otherwise timely notice.[19] Since the carrier's address was contained in block 9 of the DD Form 1840, the Army established a prima facie case of dispatching the form to the carrier within seventy-five days, as indicated by the dispatch date in Block 3b of the DD Form 1840R.[20] *Patriot Forwarders* demonstrates that field claims personnel should take time to ensure that all blocks of the DD Form 1840R are properly completed. Taking time early in the claims process to fill in all documents with the correct information will eliminate issues for the carrier to challenge later.

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8. Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules (1 Jan. 1992), *reprinted in* ARMY LAW., Mar. 1992, at 45. *See* Household Goods Recovery Notes, *Digest of Recent Comptroller General and GAO Decisions*, ARMY LAW., Dec. 1992, at 34.

9. Comp. Gen., B-249840 (Mar. 1, 1993).

10. *Id.*

11. Personnel Claims Recovery Notes, *Proper Dispatch of DD Form 1840R*, ARMY LAW., Oct. 1992, at 43.

12. Personnel Claims Recovery Notes, *Use of Continuation Sheets for the DD Form 1840*, ARMY LAW., June 1993, at 53. The outbound transportation counselor should counsel the soldier on the use of continuation sheets when completing the DD Form 1840, Joint Statement of Loss or Damage at Delivery.

13. Comp. Gen., B-247457 (Aug. 26, 1992).

14. *Id.*

15. *Id.*

16. Department of the Army, Comp. Gen., B-255795 (June 3, 1994) (The carrier gave the shipper a blank form.).

17. *See* Claims Report, *The Search for Mr. Goodbar and Storage—Revisited*, ARMY LAW., Oct. 1994, at 71.

18. Claims Appeals Board, Claims Case No. 96070217 (Nov. 19, 1996).

19. *Id.*

20. *Id.*

Adequate Notice—Damage Descriptions and Errors. In numerous opinions, the Comptroller General has held that:

> [W]hen the DD Form 1840R provides written, timely notice to the carrier of additional loss or damage after delivery, that notice need not include specific itemized exceptions . . . . Notice of a claim is sufficient if it alerts the carrier that damage or loss occurred for which reparation is expected so that the carrier may promptly investigate the facts.[21]

In *Resource Protection*,[22] the carrier argued unsuccessfully that the shipper's failure to list inventory numbers on the DD Form 1840/1840R for four of nine boxes which were missing negated carrier liability.[23] In another case, the GAO Claims Group, in reviewing a carrier's challenge to no timely notice, held that a shipper's listing of the inventory number "83" for an item on the DD Form 1840R instead of "283," which was the correct number for the item, was an understandable error and that such an error did not negate timely notice.[24]

Similarly, in *Allied Transcontinental Forwarding, Inc.*,[25] the Comptroller General held that a shipper's act of listing "books and tackle box" on DD Form 1840 with a nonconforming inventory number did not shift liability away from the carrier.[26] The shipper listed the inventory number as "5" when it should have been "65." Allied claimed that there was no proof of tender because: (1) there were no books or tackle box listed for inventory number "5," (2) the shipper did not state that he had listed the wrong inventory number when filing his claim, and (3) "there was not sufficient evidence that the books and tackle box the shipper claimed to be missing were those actually inventoried as item #65."[27] The Comptroller General found that the inventory indicated that these items were tendered to the carrier.[28] The inventory was prepared so that the "6" in "65" was listed at the beginning of the ten-digit series that started the "60" series, but no "6" was placed in front of the "5." It was an understandable error, and there was only one inventory line item with "books and tackle box" listed on the inventory.[29]

The concept of adequate notice to the carrier was also highlighted in *AAA Transfer and Storage, Inc.*,[30] where the carrier argued that it was not responsible for the damage claimed to an antique mirror. There was no pre-existing damage to the mirror noted on the inventory. On the DD Form 1840R the shipper indicated the mirror was scratched, and the repair firm noted scratches and dents on the mirror. The carrier took the position that because it did not receive timely notice of the dents, it was not liable for the damage claimed. The Comptroller General found no merit in the carrier's argument. Regardless of whether a scratch is different damage than a dent, the carrier received notice of a scratched mirror and was adequately alerted to promptly investigate.[31]

These cases illustrate that attention to detail is important in claims processing. Claims personnel should take sufficient time while the claimant is present in the claims office to review the DD Form 1840R to determine that it is completely filled out, the inventory numbers match those on the inventory, and the description of the claimed damage is accurate. If questions arise, ask the claimant to answer them. The more that can be done to perfect the claim in its early stages, the easier it will be to defend it if challenged later by a carrier.

Damage Discovered After Dispatch of the DD Form 1840R. Claims personnel can still provide timely notice to a carrier after the DD Form 1840R is dispatched, so long as the seventy-fifth day has not expired. In *Stevens Transportation Co.*,[32] the Comptroller General held that damage, so long as it is timely reported, may be reported on other forms than the DD Forms 1840/1840R.[33] The DD Form 1843, Government Inspection

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21. Resource Protection, Comp. Gen., B-270319 (May 21, 1996); American Van Serv., Inc., Comp. Gen., B-252671 (Aug. 19, 1993); American Van Serv., Inc., Comp. Gen., B-249834 (Feb. 11, 1993); Continental Van Lines, Inc., Comp. Gen., B-215507 (Oct. 11, 1984) (A clear delivery receipt does not overcome the later dispatched DD Form 1840R.).

22. Comp. Gen., B-270319 (May 21, 1996).

23. *Id.*

24. GAO Settlement Certificate, Z-2862118 (Aug. 3, 1992). GAO decisions cannot be cited for precedent. Nevertheless, the reasoning used by the Claims Group may assist claims personnel in responding to a carrier challenge of a similar nature.

25. Comp. Gen., B-270314 (Feb. 16, 1996).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Comp. Gen., B-248535 (Oct. 22, 1992).

31. *Id.*

Report, was dispatched to the carrier within seventy-five days of delivery, and that was sufficient to notify the carrier about broken legs on a dresser. The carrier had complained that the DD Form 1840 indicated that the dresser legs were chipped, but on the DD Form 1844, List of Property and Claims Analysis Chart, the dresser legs were listed as broken. The carrier argued that the damage was so different that there was no timely notice. As noted above, the Comptroller General found that the carrier did receive the DD Form 1843 with notice of the dresser's broken legs within the prescribed notice period and that was sufficient notice.[34] Field claims personnel should always be alert to later-discovered damage or other damage noted on the claimant's DD Form 1844 that is different from that damage noted on DD Forms 1840/1840R. If field claims personnel make such a discovery, they should not hesitate to mail the claimant's DD Forms 1844, or any other notice document, to the carrier.

Tender of Service: Inventories—Missing Items

Checking All Items on Inventory at Time of Delivery. Carriers will often argue that they are not liable for missing items (especially items missing from cartons) where the signed delivery inventory indicates that the shipper checked off on the line numbers for the missing items. However, the Comptroller General has held that such initials or check marks are not conclusive evidence of delivery of the items which will overcome a DD Form 1840R which is properly dispatched later.[35] Claims personnel should be alert to this situation and, if a claim has missing items, check the inventory to see if check marks or the claimant's initials appear beside the line items. If such markings are present, obtain a statement from the claimant explaining what occurred at delivery regarding the annotations on the inventory and the later-discovered missing items. The claimant must explain why the inventory items were checked off or initialed as received but later claimed as missing.

Household Goods (HHG) Not Listed on the Inventory but Missing. The HHG descriptive inventory is an extremely important document in the claims process. It serves several different functions: proof of tender, proof of ownership, and description of preexisting damage (PED). It is a document that a soldier needs to take interest in while it is being completed by the carrier's representative prior to his/her departure with the soldier's HHG. The Comptroller General has held that a carrier does not have to list every item on an inventory; however, "a carrier can be charged with the loss even if household goods are not listed on the inventory, where circumstances are sufficient to establish that the goods were shipped and lost."[36] What are such "circumstances?" The claimant must present some substantive evidence of tender to establish the first element of a prima facie case.[37] An acknowledgment on the claim form of the penalties for filing a false claim;[38] an unsupported, self-serving acknowledgment;[39] or filled-in preprinted forms will not suffice.[40] What the Comptroller General has found acceptable is a *personal written statement* by the claimant that describes the circumstances surrounding the packing, moving, delivery, and discovery of the loss of the missing items.[41]

A very detailed personal statement from the claimant will greatly improve a claims office's chances of successfully refuting a carrier's argument of no tender. These chances are further improved if the statement is combined with other supporting documentation of proof of ownership (especially for items over $100), such as, sales receipts, canceled checks, credit card receipts, or photographs; proof of tampering with the carton (e.g., use of different colored tape than originally used); and proof that the item was listed on premove documents (DD Form 1701, Inventory of Household Goods, and DD Form 1299, Application for Shipment and Storage of Personal Property).[42] For example, in *Fogarty Van Lines*,[43] the Comptroller General held that the surrounding circumstances supported tender to the carrier of a vacuum that was left off of the inventory and was not delivered.[44] The claimant had completed a "Hi-Val" inven-

32. Comp. Gen., B-244701 (Jan. 9, 1992).

33. *Id.*

34. *Id.*

35. Resource Protection, Comp. Gen., B-265978 (Apr. 26, 1996); Andrews Van Lines, Comp. Gen., B-257399 (Dec. 8, 1994); National Forwarding Co., Reconsideration, Comp. Gen., B-238982.2 (June 3, 1991). *See* Personnel Claims Note, *Checking Items Off the Inventory*, ARMY LAW., Dec. 1996, at 39.

36. Fogarty Van Lines, Comp. Gen., B-23558.4 (Mar. 19, 1991) (unpub.).

37. Department of Army—Reconsideration, Comp. Gen., B-205084 (June 8, 1983).

38. National Claims Serv., Inc., Comp. Gen., B-260385 (Aug. 14, 1995).

39. Cartwright Van Lines, Inc., Comp. Gen., B-243746 (Aug. 16, 1991) ("Although every household good need not be listed, we would not permit a shipper to establish tender to the carrier only on the strength of an unsupported, self-serving acknowledgment.").

40. OK Transfer & Storage, Inc., Comp. Gen., B-261577 (Mar. 20, 1996); Aalmode Transp. Corp., Comp. Gen., B-240350 (Dec. 18, 1990).

41. Department of Army—Reconsideration, Comp. Gen., B-205084 (June 8, 1983). *See* Personnel Claims Note, *Missing Packed Items: A Trumpet Missing from a Carton of Games, Jewelry Missing from a Jewelry Box*, ARMY LAW., July 1995, at 70; Personnel Claims Notes, *Proof of Tender When Items are not Listed on the Inventory*, ARMY LAW., July 1994, at 49.

tory five days prior to completion of the standard shipment inventory in which the vacuum was listed; the claimant made a detailed statement explaining how the vacuum was the last item loaded on the moving truck; and the standard shipment inventory described two items as vacuum parts (which suggests the claimant would not have the one without the other).[45] *Valdez Transfer, Inc.*[46] involved a similar situation. A waterbed thermostat turned up missing but was not listed on the inventory. The Comptroller General found sufficient evidence to support tender through the detailed statement of the claimant and the inventory which listed other waterbed parts.[47] Additionally, "a carrier is not relieved of liability for missing items merely because it delivered the carton in which the items were packed in the same sealed condition that it was in when the carrier received the items. The carrier must show that the items were not removed from their carton while the carton was in the carrier's possession."[48]

Field claims personnel must recognize potential roadblocks to a successful recovery demand and thoroughly question the claimant. Claimants should provide information to address the following issues:

1. How does the claimant know that the item was tendered?
2. Describe the circumstances at the time of tender (for example, the location of the item in the home, special packing or handling required, and comments about the item made to or by the carrier's representatives).
3. Did the claimant see the carrier's representative pack the item?
4. Was the item listed on the inventory? If not, why not? Why did the claimant sign the inventory when the item was not listed? If yes, did the inventory accurately describe the item? If the item was packed in a carton, but not specifically identified on the inventory, was the inventory description for the carton reasonably related to the missing item?
5. Does the claimant have proof of ownership, such as proof of purchase (paid receipt, canceled check, installment agreement, credit card statement), photograph, or insurance inventory?
6. Are there witnesses, including the spouse, who can attest to the ownership of the missing item (e.g., a friend or neighbor who visited the home just prior to the move and saw the item in the home)?
7. Is there any evidence of carton tampering?
8. Did any unusual circumstances exist at the time of delivery?
9. If the claimant failed to notice the item was missing at the time of delivery, why did this happen?
10. Why did the claimant check or initial inventory line numbers without checking to see if the item was in fact delivered?[49]

For items claimed as missing which were not listed on the inventory, the Comptroller General has upheld offset action against the carrier if the military claims service could show that the missing item was packed in a carton with a reasonably related item that *did* appear on the inventory. In *American International Moving, Corp.*,[50] the Comptroller General held a carrier liable for "items claimed lost from a carton that [did] not exactly fit the carton's inventory description where it would not have been unusual to pack those items in such carton, particularly where the carrier did the packing and prepared the inventory list."[51] In this case, clothing was missing from a carton labeled "linen." Other examples include drapes packed in a carton labeled "clothes" and Halloween items missing from a carton labeled "Christmas Tree;"[52] golf shoes missing from a carton labeled "shoes;"[53] a trumpet missing from a carton

42. *See* Allied Freight Forwarding, Inc., Comp. Gen., B-260695 (Sept. 29, 1995). The inventory did not list a VCR, and Allied did not deliver a VCR. However, Allied was held liable because the claimant, on DD Form 1701, the premove inventory sheet completed by a shipper prior to carrier packing, listed a Goldstar VCR purchased in 1986. This document, combined with a detailed statement from the claimant that he believed Allied packed the VCR with other items, was sufficient proof of tender. *See also* National Claims Serv., Inc., Comp. Gen., B-260385 (Aug. 14, 1995); Department of Army—Reconsideration, Comp. Gen., B-205084 (June 8, 1983).

43. Comp. Gen., B-235558.4 (Mar. 19, 1991).

44. *Id.*

45. *Id.*

46. Comp. Gen., B-197911.8 (Nov. 16, 1989) (unpub.).

47. *Id.*

48. Household Goods Recovery Notes, *Digests of Recent Comptroller General and GAO Decisions*, ARMY LAW., Dec. 1992, at 33. *See* Cartwright Van Lines, Inc., Comp. Gen., B-243746 (Aug. 16, 1991); Aalmode Transp., Comp. Gen., B-240350 (Dec. 18, 1990); Olympic Forwarders, Inc., GAO Settlement Certificate, Z-2866988(15) (Aug. 15, 1993).

49. Personnel Claims Note, *Missing Packed Items: A Trumpet Missing from a Carton of Games, Jewelry Missing from a Jewelry Box*, ARMY LAW., July 1995, at 70; Personnel Claims Notes, *Proof of Tender When Items are not Listed on the Inventory*, ARMY LAW., July 1994, at 50.

50. Comp. Gen., B-247576.2 (Sept. 2, 1992).

51. *Id.*

labeled "games;"[54] a waterpick packed with "bathroom items;" a camera packed with "storage items;" a basket packed with "games;" a plaque packed with books (because a plaque is flat, like a book); a vacuum cleaner brush packed with the vacuum; a VCR and computer programs packed with cartons labeled "tapes" and "miscellaneous;" and a framed picture packed with "dried flowers" (because both are decorative items).[55] On the other hand, the Comptroller General "absolved the carrier of liability for the claimed loss of a shotgun from a carton labeled 'Wardrobe stuffed animals.'"[56]

The importance of the claimant's detailed statement cannot be stressed enough. In *American Van Pac Carriers*,[57] the Comptroller General held a carrier liable for a telephone that was missing from a carton labeled "kitchen glass" on the inventory and for a camera that was missing from a carton labeled "lamps."[58] The claimant provided a detailed statement of how those items came to be packed in those cartons even though the listed items were seemingly unrelated to the missing items.[59]

Pay attention to how the carrier labels the contents of a carton on a particular line item on the inventory. If improper descriptive terms are used and the claimant states that a missing item was packed in such a carton, the carrier will have difficulty refuting tender. In *Andrews Van Lines, Inc.*,[60] the GAO found in favor of the USARCS where:

> [I]n preparing the inventory, Andrews' agent annotated item #98 as "1.5 ctn, LR items, CP" [1.5 cubic foot carton, living room items, carrier packed]. In this instance, the carrier has failed to properly identify the contents of the carton in accordance with Paragraph 54(d) [now paragraph 55d], of the Tender of Service, which directs the carrier to avoid the use of general descriptive terms when preparing inventories. Paragraph 54(e) [now paragraph 55e], further directs the carrier to list and describe items of property to the extent necessary to properly identify them. Paragraph 54(r) [now paragraph 55s] reminds the carrier to avoid the use of vague descriptive terms, and further warns the carrier that if such terms are used it cannot contest a claim for missing items.[61]

In this case, the claimant listed six Hummel figurines on DD Form 1840R as missing from carton #98, and he provided a statement that the items were tendered for shipment.

Even if claims personnel have supporting documentation, it will be difficult to prove tender when the missing items are very valuable. For example, in GAO Settlement Certificate Z-2817671(70), 22 March 1995, the GAO claims group held that the carrier was not liable for missing valuable rings, despite a vigorous defense by the USARCS which included detailed statements from the claimant, proof of ownership, and reasonable relationship of missing items to the item listed on the inventory (missing rings from an inventory line item labeled "jewelry box").[62] GAO maintained there was insufficient proof of tender and stated that they would closely scrutinize missing high value items. The USARCS did not appeal this decision. Therefore, the burden is on the claimant to make sure such items are listed and well described on the inventory. Generally, such losses are not payable. Field claims personnel should make every effort to publish such information in local media to achieve the widest possible dissemination. When field claims personnel are faced with such an issue, they should gather as much information as possible to support the Army's position regarding tender and then call the USARCS to discuss possible action before asserting a demand.[63]

Internal Damage to Electronic Items

52. Carlyle Bros. Forwarding Co., Comp. Gen., B-247442 (Mar. 16, 1992).

53. Paul Arpin Van Lines, Inc., Comp. Gen., B-213784 (May 22, 1984) (unpub.).

54. Andrews Van Lines Inc., Comp. Gen., B-257398 (Dec. 29, 1994) (unpub.).

55. Household Goods Recovery Notes, *Digests of Recent Comptroller General and GAO Decisions,* ARMY LAW., Dec. 1992, at 35.

56. Carlyle Bros. Forwarding Co., Comp. Gen., B-247442 (Mar. 16, 1992).

57. Comp. Gen., B-256688 (Sept. 2, 1994).

58. *Id.*

59. *Id. See* GAO Settlement Certificate, Z-2862146(29) (Jan. 18, 1995). The GAO held a carrier liable for a missing display case filled with valuable military insignia. The display case was not listed on the inventory, but the claimant provided a detailed statement as to how the carrier packed the item in a mirror carton. The inventory had 14 picture cartons listed (it had to be one of them), and the claimant supplied pictures of a display case similar to his.

60. GAO Settlement Certificate, Z-2729037-75-347 (Oct. 12, 1993).

61. *Id.*

62. GAO Settlement Certificate, Z-2817671(70) (Mar. 22, 1995) .

If there is one area of constant tension between the military claims services and the carrier industry, it is the area regarding internal damage to electronic items without corresponding external damage. Recall that to establish a prima facie case of carrier liability, field claims personnel must establish that the item was tendered to the carrier in a certain condition, that the item was damaged while in the carrier's possession, and the amount of the damage. One of the difficulties revolves around establishing tender of the item in good condition. Unfortunately, the inventory prepared by the carrier is of little help here.

> Carriers are not required to know or note the working condition of electronic items or appliances prior to shipment. The tender of service and many decisions of the Comptroller General preclude the government from arguing that the absence of inventory notations establishes a presumption that the item was in good working condition prior to shipment. These decisions recognize that for both practical and safety reasons, carriers cannot be expected to plug in electronic items to see if they work . . . .[64]

A claimant's personal statement as to the working condition of the damaged electronic item prior to shipment is extremely important to establish the condition of the item at the time of tender to the carrier. Field claims personnel should assist claimants in preparing such statements. Claimants should avoid submitting "fill-in-the blank" statements. Claimants must prepare personal statements that specifically address the condition of their electronic items. Statements should address several questions: what is the make and model of the item, is it new or used, has it been repaired recently, when was it last used before the move (the closer in time between the time the item was used and the time of the move, the better), and is there a third party who can establish the working condition of the item prior to the move? Additionally, claims personnel should have claimants provide any information that will help explain the damage, such as how the item was packed, how the item was loaded on the moving van, who packed the item, and whether the item was dropped.[65]

Obtaining a detailed personal statement from the claimant is only half of the battle. To substantiate that the internal damage is shipment related, the claimant will need an estimate of repair from a qualified electronics repair firm. Such a repair estimate must be *detailed, credible, and convincing.* Field claims offices should have estimate of repair forms for use by the claimant and should include the forms in the claims packet. A sufficient estimate of repair should, at a minimum, address the following questions:

1. Is this the type of damage that [could have] occurred in transit? Why?
2. Are there loose components in the [item]?
3. Can loose parts be heard?
4. Was there a cracked circuit board?
5. Did solder points come loose or break during shipment due to rough handling?
6. Were electronic parts misaligned due to improper handling or inadequate packing for shipment?
7. How is this damage different from normal wear and tear [e.g., dried out parts due to long-term storage or due to claimant's negligence; burned out power supply because the item was subjected to dual voltage]?[66]

If field claims personnel are not satisfied with the information provided by the estimate of repair, they should not hesitate to contact the repair firm to ask questions. Estimates of repair that merely state that the damage "possibly occurred in shipment" or that the item was "damaged in shipment" require more explanation. Record all phone conversations on the claims chronology sheet along with the name of the person spoken to and the name of the person making the call.[67]

Armed with a claimant's detailed statement and a good estimate of repair, field claims personnel can rebut carrier allegations that the damage was not caused by the carrier. In *Carlyle Van Lines, Inc.*,[68] the Comptroller General held a carrier liable for damage to a television when the military claims service provided a statement from the claimant as to the good working condition prior to shipment and the estimate of repair indicated that the main circuit board was broken due to mishandling or dropping.[69] In *Allied Intermodal Forwarding, Inc.*,[70] the claim-

63. Personnel Claims Note, *Missing Packed Items: A Trumpet from a Carton of Games, Jewelry Missing from a Jewelry Box,* ARMY LAW., July 1995, at 70; Personnel Claims Note, *Proof of Tender When Items are not Listed on the Inventory,* ARMY LAW., July 1994, at 50.

64. Personnel Claims Notes, *Internal Damage to Electronic Items—Revisited,* ARMY LAW., Jan. 1994, at 40.

65. Personnel Claims Note, *Internal Damage to Electronic Items,* ARMY LAW., May 1993, at 50.

66. Personnel Claims Note, *The Importance of Repair Estimates for Electronic Items,* ARMY LAW., Aug. 1996, at 36.

67. *Id.*

68. Comp. Gen., B-257884 (Jan. 25, 1995).

69. *Id.*

70. Comp. Gen., B-258665 (Apr. 6, 1995).

ant indicated in his statement that his television worked prior to pickup, did not work at delivery, and there were no signs of external damage. The carrier argued that there was no proof the television worked prior to pickup and that the damage was due to normal truck vibrations. However, the estimate of repair indicated that the shadow mask loosened inside the television, which was consistent with the television being dropped or subjected to stress applied to the face of the tube. Based on this evidence, the Comptroller General held for the military claims service.[71] The importance of the claimant's statement and the estimate of repair is further illustrated in *Dep't of the Army—Reconsideration,*[72] where:

> [T]he GAO Claims Group held for the carrier because there was no proof that the video cassette recorder (VCR) worked at origin and there was no external damage to the VCR. The Comptroller General reversed the GAO settlement certificate citing the [servicemember's] personal statement that stressed the VCR worked at origin and the broken circuit card was consistent with an item having been dropped.[73]

Exceptions to Carrier Liability

A carrier is liable for "damage to goods transported by it unless it can show that the damage was caused by (a) an act of God; (b) a public enemy; (c) an act of the shipper himself; (d) action by public authority, or (e) the inherent vice or nature of the goods."[74] Of these five exceptions, three are fairly clear. Claims personnel will likely need to rely on case law for an understanding of the remaining two, which are discussed below:

Act of God. It is important for field claims personnel to carefully evaluate a carrier's argument that no liability attaches to it because an act of God caused the loss or damage to a claimant's HHG. When evaluating the carrier's argument, first determine if the alleged event constitutes an act of God, (e.g., a flood), then look to see if there is an intervening fault that can be attributed to the carrier which will not free it from liability. In two cases involving Atlas Van Lines, the Comptroller General held in favor of the military claims services when Atlas argued that the "Great Midwest Flood of 1993" was an act of God that exonerated it of liability for HHG stored in a warehouse flooded by the Missouri River.[75] The Comptroller General found that "although a flood [is] an act of God, the failure to take action to move the household goods before the crest of the flood reached the storage facility constitute[d] the intervening fault of negligence."[76] Through thorough investigation, the military claims services were able to show that severe flooding occurred on the upper Missouri and Mississippi Rivers and continued downstream towards Chesterfield, Missouri, where the HHG were stored. Atlas was, or should have been, aware of the significance of this flood. It had time, had it acted promptly, to move the HHG. "The fact that the structural failure of the Monarch Chesterfield levee was not anticipated [did] not absolve Atlas of liability, since flood waters had overtopped the levee long before the levee failed."[77]

2. *Inherent Vice or Nature of the Goods.* The Comptroller General has defined "inherent vice" as "an existing defect, disease or decay, or the inherent nature of the commodity, which will cause it to deteriorate over time without any outside influence."[78] A carrier is not liable for such damage to HHG if this exception applies, but field claims offices should not accept at face value a carrier's statement denying liability because of this exception. Once a servicemember establishes a prima facie case against the carrier for damage to the servicemember's HHG, the burden shifts to the carrier to prove that inherent vice is responsible for the claimed damage and that the carrier is free of liability.

In *Aalmode Transportation Corp.*,[79] the carrier denied liability for damage to certain pieces of furniture by alleging that humidity had caused the packing material to stick to the furniture and that such damage was caused by the "operation of natural laws." The USARCS argued that the damage was caused by poor quality packing materials and/or labor that was used to pack the furniture. The Comptroller General agreed with the USARCS and pointed out that Aalmode did not refute the

71. *Id.*

72. Comp. Gen., B-255777.2 (May 9, 1994).

73. Personnel Claims Notes, *Recent Comptroller General Decisions,* ARMY LAW., Nov. 1995, at 53.

74. Missouri Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964); McNamara-Lutz Vans and Warehouses, Inc., 57 Comp. Gen. 415, 418 (Apr. 18, 1978). *See* Cartwright Int'l Van Lines, Comp. Gen., B-260372 (Oct. 31, 1995).

75. Atlas Van Lines, Comp. Gen., B-261321 (Apr. 22, 1996); Atlas Van Lines, Comp. Gen., B-261348 (Feb. 16, 1996).

76. Atlas Van Lines, Comp. Gen., B-261321 (Apr. 22, 1996).

77. Atlas Van Lines, Comp. Gen., B-261348 (Feb. 16, 1996).

78. Caisson Forwarding Co., Comp. Gen., B-251042 (Apr. 21, 1993).

79. Comp. Gen., B-237658 (Feb. 12, 1990).

Army's argument. The Comptroller General was unable to conclude that the nature of the furniture finish alone was such that it would lead to humidity-generated damage to the property over a transit period of two days in mid-June.[80] In *Caisson Forwarding Co., Inc.*,[81] a case of similar facts, the carrier argued that damage to a dresser and a coffee table was the result of the inherent vice or nature of the items. "Caisson relie[d] on a statement from its repair firm which simply described a dresser [as having] the 'inherent vice' of a 'soft finish,' and a coffee table as having the 'inherent vice' of being 'over waxed.'"[82] The Comptroller General held that the repair statement did not overcome the carrier's liability.[83] The carrier offered little evidence that it exercised reasonable care in padding the furniture, and it "also [had] not shown why the soft finish and over-waxing were not detectable at origin in this case by ordinary observation, or why items with such characteristics [could] not be prepared for shipment to avoid damage."[84]

In a more recent case, the Comptroller General held the carrier liable for a carpet damaged by mildew, dry rot, and insect infestation.[85] The facts indicated that the carrier picked up the carpet, along with other HHG, from a nontemporary storage (NTS) contractor, but the carrier did not inspect the carpet or take exception to the carpet's condition on the rider. However, "several months after delivery, an appraiser found that the carpet was infested with live moths and active moth larva, and that moth damage pervaded the entire carpet. The carpet also had extensive areas of mildew and dry rot, and in some areas the carpet had disintegrated from dry rot damage."[86] The carrier, Towne, argued inherent vice but failed to meet its burden of proof. The Comptroller General stated:

> Towne did not present any expert evidence with regard to mildew, dry rot, or insect infestation which would have precluded the probability that these damages had occurred in transit in view of the amount of time the carpet remained in Towne's custody [eleven days versus three years for the NTS contractor] and the condition in which it was shipped.[87]

Failure to inspect and record findings on the rider and no expert opinion to demonstrate when the damage occurred resulted in Towne's liability for the carpet.[88]

While the burden of proof on the carrier may seem onerous, field claims personnel should not hesitate to demand from the carrier proof (such as an expert opinion) beyond an allegation or general comment from the carrier's repair firm that the damage was caused by an inherent vice or the nature of the goods. At the same time, do not forget common sense in responding to the carrier's denial. A compromise may be in order in certain cases where damage by inherent vice is questionable. Contact the USARCS to discuss such cases.

Carrier Inspection Rights

The Carrier Must Pursue Its Inspection Rights. The MOU, at paragraph II, provides that:

> (A) The carrier shall have 45 calendar days from delivery of shipment or dispatch of each DD Form 1840R, whichever is later, to inspect the shipment for loss and/or transit damage.
>
> (B) If the member refuses to permit the carrier to inspect, the carrier must contact the appropriate claims office which shall facilitate an inspection of the goods. It is agreed that if the member causes a delay by refusing inspection, the carrier shall be provided with an equal number of days to perform the

80. *Id.*

81. Comp. Gen., B-251042 (Apr. 21, 1993).

82. *Id.*

83. *Id.*

84. *Id.*

85. Towne Int'l Forwarding, Inc., Comp. Gen., B-260768 (Dec. 28, 1995).

86. *Id.*

87. *Id. See* Eastern Forwarding Co., Comp. Gen., B-248185 (Sep. 2, 1992); Stevens Transp. Co., Comp. Gen., B-243750 (Aug. 28, 1991). The carrier in *Stevens* was held liable for warpage to a waterbed even though it had possession of the item for three weeks and the NTS warehouse had the item for more than two years. The carrier presented no evidence as to the actual conditions at the warehouse or as to how the warehouse caused the damage. Nor did the carrier show that there was something inherent in the nature of the waterbed that would lead to warpage without outside influence.

88. Towne Int'l Forwarding, Inc., Comp. Gen., B-260768 (Dec. 28, 1995). *See* American Intercoastal Movers, Inc., Comp. Gen., B-265689 (Feb. 22, 1996). The carrier in *American* argued that damage to a dining table and wall unit (veneer cracking) was attributable to climatic conditions. The Air Force Claims Service argued that the damage was attributable to water damage. The Comptroller General held for the Air Force and indicated that the carrier presented no evidence other than a comment by its inspector to rebut its liability.

inspection/estimate (45 days plus delay days caused by member).[89]

A difficult issue for field claims personnel to resolve is whether the carrier vigorously pursued these rights when the carrier argues that its inspection rights were denied and that, therefore, no liability attached. In *Stevens Worldwide Van Lines, Inc.*,[90] the Comptroller General set forth guidance that field claims personnel should apply to each claim where inspection rights become an issue. "A carrier is not prima facie liable for damage to an item of household goods where the carrier vigorously pursued its inspection rights within the time permitted by the [MOU] . . . and the record indicates that the carrier had a substantial defense involving facts discoverable by inspection.[91]

When a carrier raises the issue of denial of inspection rights, claims personnel should obtain answers to the following questions:

1. Did the carrier attempt to contact the claimant to arrange an inspection within the time allowed by the MOU? How was contact attempted (by telephone, by letter, by both)? How many attempts were made?
2. What was the claimant's response, if any?
3. Did the carrier contact the field claims office for assistance? If yes, what assistance was provided? (Remember that field claims personnel can deduct lost potential carrier recovery from a claimant who will not cooperate.)
4. Did the claimant dispose of the item? Did the claimant have the item repaired?
5. Does the carrier have a substantial defense involving facts that could have been discoverable by an inspection? For example, did the claimant dispose of an item that possibly could have been repaired?
6. Has the field claims office informed the claimant, either orally or in writing, not to dispose of any items until the inspection period has run? (This is a good practice to adopt if the field claims office has not already done so.)
7. Has the carrier's conduct contributed in any manner to its failure to inspect?

In *Stevens Worldwide Van Lines, Inc.*,[92] the Comptroller General held the carrier not liable for damage to a waterbed which was given by the claimant to a neighbor, who was an unqualified repairman. The neighbor threw the waterbed away before the carrier could inspect it.[93] Stevens wrote the claimant, but was unable to contact him. In turn, Stevens contacted the local Air Force claims office for assistance. The claims office gave Stevens the claimant's new address. The claimant had moved from Alabama to Florida, but he had left the waterbed in Alabama with a neighbor to repair. The carrier also argued that the subsequent move denied it the right to inspect other damaged items; however, the Comptroller General held that "a carrier cannot usually avoid being held prima facie liable for loss or damage to the household goods it transports merely because circumstances prevent it from inspecting the damage . . . . Stevens could have observed the shipment in Florida, after it was moved, or in Alabama before it was moved . . . ."[94]

Several other cases illustrate what the Comptroller General means by "vigorously pursue inspection rights." In *Fogarty Van Lines*,[95] the carrier encountered an uncooperative claimant, but failed to contact the local field claims office for assistance. Such action was insufficient to defeat liability.[96] In *American Intercoastal Movers, Inc.*,[97] the carrier attempted to inspect a pair of skis, but neither the skis nor the claimant were at the claimant's home when the carrier's inspector visited. (Only the claimant's son was home.) The carrier made no other attempt to inspect, did not request assistance from the field claims office, and the claimant did not intentionally deny the carrier the right to inspect. The Comptroller General held the carrier liable.[98] However, in *Move U.S.A.*,[99]

89. Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules (1 Jan. 1992).

90. Comp. Gen., B-251343 (Apr. 19, 1993).

91. *Id.;* National Forwarding Co., Comp. Gen., B-260769 (Nov. 1, 1995). The carrier vigorously pursued inspection rights with respect to large quantities of broken crystal glasses. The claimant discarded the items before an inspection could be made. The issue was whether the carrier had a substantial defense involving facts discoverable by inspection. The value of the items was questionable, the claimant had no purchase receipts, and the Comptroller General, holding for the carrier, determined it was reasonable for claimant to retain the broken crystal in its shipping carton for the carrier to inspect. *See also* Ambassador Van Lines, GAO Settlement Certificate, Z-2862212-19 (undated); Personnel Claims Note, *Recent Comptroller General Decisions,* ARMY LAW., Nov. 1995, at 54.

92. Comp. Gen., B-251343 (Apr. 19, 1993).

93. *Id.*

94. *Id.*

95. Comp. Gen. B-235558 (Dec. 19, 1989).

96. *Id. See* Personnel Claims Notes, *Carrier Inspection Rights,* ARMY LAW., Oct. 1996, at 48.

97. Comp. Gen. B-265689 (Feb. 22, 1996).

98. *Id.*

> [T]he carrier made numerous attempts to arrange an inspection in a timely manner. It tried to schedule an inspection directly with the [servicemember] . . . . It then sent a certified letter to the claims office asking for assistance. The claims office was unresponsive. The carrier then followed with another letter to the claims office, but still got no help in arranging an inspection.[100]

The carrier was held not liable for damage to the compact discs it wanted to inspect.

Carrier's Failure to Inspect After Notice. When a carrier receives adequate notice of damaged items, the carrier is alerted that inspection may be required.[101] Failure to inspect, for whatever reason (e.g., business cost), when inspection could have resolved the issue, is to the carrier's detriment. In *Able Forwarders, Inc.*,[102] the carrier argued that a damaged mattress was smaller than the claimed king-size mattress because the inventory indicated that it was packed in a carton which was too small for a king-size mattress. The Comptroller General found for the military claims service.[103] The claimant stated that he owned a king-size mattress, and the carton listed on the inventory, a "3/3" carton, was too small to hold a mattress. The Comptroller General remarked that he was unaware of any standard carton size such as the one listed by Able. Therefore, Able may have understated the dimensions for the mattress when it prepared the inventory.[104] Regardless, "Able was notified at delivery . . . that the damage had occurred; it had the opportunity to inspect and ascertain the size of the damaged article."[105] Field claims personnel should highlight a carrier's failure to inspect when inspection could have resolved the issue. The carrier should not be allowed to benefit from its inaction where inspections are concerned.

Additionally, carriers have "the responsibility to inspect all prepacked goods to ascertain the contents, [the] condition of the contents, and that only articles not otherwise prohibited by the carrier's tariff/tender are contained in the shipment."[106] Claims personnel should keep this carrier responsibility in mind. Carriers often attempt to escape liability by arguing that items packed by the claimant were not identified on the inventory and were therefore not tendered. While this argument will generally fail, the responsibility to inspect prepacked goods has some limits. The GAO has determined that while "a carrier is responsible to inspect all goods prepacked by another carrier, [that responsibility does not extend to] goods that are factory packed."[107] The case involved "a headboard [which] was picked up by the carrier packed in the factory crate. There was no damage to the crate at pick-up and no damage was noted at delivery."[108] A different conclusion may have been reached had the crate reflected some transit damage.

Inventory Riders (Exception Sheets)

Field claims personnel must forward to the USARCS for recovery action all claims involving a carrier and an NTS warehouse, but, before doing so, field claims personnel must prepare a demand. To properly prepare such a demand, claims personnel must understand the purpose of a rider; who is responsible for completing it; and how a rider, properly executed, can shift liability from the carrier back to the NTS warehouse.[109] With this knowledge, field claims personnel are better equipped to prepare a complete demand packet that successfully identifies the liable party or parties.

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99. Comp. Gen. B-266112 (May 15, 1996).

100. *Id.*

101. American Van Serv., Inc., Comp. Gen., B-252671 (Aug. 19, 1993).

102. Comp. Gen., B-248892 (Oct. 30, 1992).

103. *Id.*

104. *Id*.

105. *Id.*

106. Ambassador Van Lines, Inc., GAO Settlement Certificate, Z-2862212.19 (undated).

107. Emerald City Int'l Corp., GAO Settlement Certificate, Z-2864434(6) (June 9, 1993).

108. *Id.*

109. *See* Household Goods Recovery Note, *Carrier Exception Sheets and NTS Storage*, ARMY LAW., Aug. 1992, at 37:

> The government often will issue a "through government bill of lading" (TGBL), authorizing a carrier to pick up a soldier's [HHG] from [an NTS] warehouse in which these goods have been stored pursuant to the Military Traffic Management Command Basic Ordering Agreement (BOA). The TGBL carrier then is liable for loss and damage as the "last handler" of the shipment, unless it can show that the items in question were lost or damaged before the carrier collected the shipment from the NTS warehouse. To prove that losses or damage occurred before pickup, the carrier's agents must prepare an exception sheet, or "rider," in accordance with paragraph 54m [now paragraph 55m] of the Personal Property Household Goods and Unaccompanied Baggage Tender of Service . . . .

In *American Van Services, Inc.,*[110] the Comptroller General held the carrier liable for damage to missing items that were packed by the NTS warehouse.[111] The rider stated that the respective cartons were crushed, but nothing more. American did not open and inspect the items in the cartons at the time of pick up from the NTS warehouse. American had the right to inspect, and its speculation as to the cause of damage did not shift liability to the NTS warehouse.[112] In *Cartwright International Van Lines*,[113] the carrier picked up a six-piece bedroom set from an NTS warehouse. The carrier also picked up many drawers that did not belong to the set. "Two night stands had four incorrect drawers, a chest had two wrong drawers out of five, and all six drawers in a dresser were incorrect."[114] Had a thorough inspection of the items been done, these discrepancies would have been noticed. Cartwright did not complete the rider reflecting these discrepancies, and, as the last handler, it was liable. In this case, the Comptroller General noted the importance of the ability of the claimant to produce the original receipt for the bedroom set and the Army's subsequent inspection.[115] In *Towne International Forwarding, Inc.,*[116] the Comptroller General held the carrier liable for dry rot, mildew, and insect damage to a carpet, where the carrier failed to unroll the carpet, inspect it, and properly note the damage on the rider.[117] Even though the carrier was in possession of the carpet for a short period of time in relation to the time the NTS warehouse held the item (eleven days versus three years), failure to annotate the rider with a description of the damage resulted in carrier liability. The Comptroller General had no factual basis to conclude that the damage claimed could not have occurred while the carpet was in Towne's possession.[118]

These decisions clearly demonstrate that to shift the burden to the NTS warehouse, the carrier must present clear evidence that the damage or loss occurred prior to the carrier's receipt of the HHG from the NTS warehouse. The Comptroller General's holdings also demonstrate the type of evidence needed for a carrier to successfully shift the burden. In *Fogarty Van Lines*,[119] the Comptroller General did not hold the carrier liable when the carrier demonstrated that the damage to a chandelier did not occur while in its possession.[120] It is unclear from the decision whether the rider was an issue. However, Fogarty showed that the damage claimed was clearly listed on the original inventory prepared by the NTS warehouse, and no additional damage was noted on the DD Form 1840 or DD Form 1840R.[121] In *Carlye Van Lines, Inc.*,[122] "a prima facie case of carrier liability [was] not established where a shipper provide[d] no evidence to support his claim that the [red carpet with flowers] he received from the carrier was different than the one he [said] he had tendered to [an NTS] contractor for shipment . . . . "[123] The carrier received the carpet from the NTS warehouse and noted on the rider that it was rolled, soiled, and badly worn. The claimant alleged the carpet tendered to the NTS warehouse was an oriental 9' x 12' carpet worth $3400, but he had no proof of quality or value. The Comptroller General indicated that it expected the record to contain more detailed evidence of the nature of the item, its value, and how the claimant's particular carpet was tendered.[124] Field claims personnel must be ever vigilant to recognize these issues and require appropriate statements and proof of ownership, quality, and value from the claimant.

In dealing with HHG which had been stored in an NTS warehouse, field claims personnel should keep in mind the following information:

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110. Comp. Gen., B-249834 (Feb. 11, 1993) (unpub.).

111. *Id.*

112. *Id.*

113. Comp. Gen., B-260372 (Oct. 31, 1995).

114. *Id.*

115. *Id.*

116. Comp. Gen., B-260768 (Dec. 28, 1995).

117. *Id.*

118. *Id.*

119. Comp. Gen., B-247449 (July 27, 1992) (unpub.).

120. *Id.*

121. *Id*.

122. Comp. Gen., B-247442.2 (Dec. 14, 1993) (unpub.).

123. *Id.*

124. *Id.*

1. Carriers can be held liable for missing hardware needed to reassemble furniture, unless noted as missing on the rider.

2. Carriers can be held liable for items missing from cartons (including sealed cartons), unless indicated on the rider.

3. Carriers can be held liable for mold and mildew damage to items, unless noted on the rider.

4. Carriers can be held liable for "concealed" damage to packed items (e.g., where there is visible damage to a carton but the carrier does not inspect the contents of the carton), unless noted on the rider.

5. Riders are invalid unless signed by both the NTS warehouse firm and the carrier. Initials by one or the other party are insufficient, unless the party whose employee's initials are on the rider acknowledges this mark. Claims personnel should question the NTS warehouse when the rider does not contain a signature or initials in the signature block.

6. If the carrier and the NTS warehouse firms are subsidiaries of the same company, then the value of the rider becomes questionable. There should be an arms-length transaction between the parties in preparing a rider because the liability for each is different.[125]

Claims personnel should call the USARCS to discuss possible approaches to these issues.[126]

Depreciation

Depreciating Items in NTS. In *Fogarty Van Lines*,[127] the Comptroller General held that the military claims services must consider the "possibility of depreciation" for the time an item is in NTS.[128] The decision does not mandate that depreciation will be taken on every item that spent some time in an NTS warehouse. However, it does require field claims personnel to consider whether depreciation is appropriate, rather than arbitrarily taking no depreciation for the time such items are in NTS. In *Resource Protection*,[129] the Comptroller General held that the Army's use of a two percent rate of depreciation per year for each year a cabinet was in NTS was reasonable even though the carrier had not agreed to such a rate.[130] It is important to note, however, that the Comptroller General "did not hold that items depreciate at the same rate in storage that they do when in active use or service."[131]

Claims personnel must be able to articulate why no depreciation, or an amount of depreciation which is less than that listed in the Joint Military-Industry Depreciation Guide, is used to calculate carrier liability for an item.[132] After consulting with numerous manufacturers, retail sales personnel, and repair firms, the USARCS determined the rate of depreciation for items in NTS and created a depreciation list for these items.[133]

Depreciating New Items not Listed on the Joint Military-Industry Depreciation Guide. If a new item is discovered which requires depreciation to determine a carrier's liability for the item but which is not specifically identified by category or item on the Depreciation Guide, claims personnel should contact the USARCS. The Air Force Claims Service successfully argued to the Comptroller General that compact discs (CDs) should be depreciated at a flat rate of ten percent a year.[134] The carrier argued that the depreciation rate should have been fifty percent, the same rate applicable to phonograph records listed in the Joint Military-Industry Depreciation Guide. However, the carrier failed to show, by clear and convincing evidence, that the Air Force Claims Service had acted unreasonably in valuing the CDs.[135]

The Reasonableness of the Amount Demanded

The typical carrier argument that claims examiners encounter is that the Army claims office has paid too much to the claimant for an item and that the carrier should not have to reimburse the Army for this amount. The key to any response to such a carrier argument is reasonableness. Does the claim file have a well-prepared estimate of repairs or a replacement cost estimate?[136] Has preexisting damage, where applicable, been factored into the amount demanded from the carrier?[137] Has depreciation been taken from the replacement cost of an item, and not from the original cost of the item?[138] Has the

125. Liability for the carrier is $1.25 times the net weight of the shipment, but the NTS warehouse's liability is $50 per line item.

126. Household Goods Recovery Note, *Carrier Exception Sheets and NTS Storage*, ARMY LAW., Aug. 1992, at 37. *See In re* A-1 Ace Moving and Storage, Inc., Comp. Gen., B-243477 (June 6, 1991) (unpub.). The USARCS follows this holding when the facts of a case specifically track A-1 Ace's facts.

127. Comp. Gen., B-248982 (Aug. 16, 1993).

128. *Id.*

129. Comp. Gen., B-260833 (May 2, 1996).

130. *Id.*

131. *Id.*

132. *See* DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, App. G (15 Dec. 1989).

133.Until a new military-industry depreciation table is established, claims personnel should use the NTS depreciation guide created by the USARCS.

134. Resource Protection, Comp. Gen., B-266114 (Apr. 12, 1996), *aff'd*, Defense Office of Hearing and Appeals, Claims Case No. 96081208 (Dec. 20, 1996); Move U.S.A., Comp. Gen., B-266112 (May 15, 1996).

lesser of the replacement cost or repair cost for an item been demanded from the carrier?[139] These are some of the questions that claims personnel must routinely answer before asserting a demand against the carrier.

The Comptroller General has determined that "in [the] absence of competent evidence from the carrier concerning the unreasonableness of the cost of repairs or market value of the damaged property, [it] will not reverse an administrative determination on such issues."[140] The carrier's allegation that the amount is too much, by itself, is insufficient to overcome the claims office's determination. When faced with such a challenge by the carrier, field claims personnel should ask the carrier to support the allegation with proof that the claims office acted unreasonably.

Conclusion

This article should provide field claims personnel with sufficient information to prepare appropriate responses to carrier challenges. Once the claims office establishes a prima facie case, the carrier has the burden to rebut with evidence of unreasonableness or incorrect application of the law. Mere allegations are not enough. Depending on the facts, a compromise may be in order. Fairness in dealing with carriers and the moving industry is important. Compromise, withdrawal of a demand, or not asserting a demand may be appropriate, and claims personnel should not see this as failing to perform. The carrier industry is aware of the Comptroller General decisions, and if these decisions support the field claims offices' position on a case, the vast majority of carriers will settle the demand.

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135. Resource Protection, Comp. Gen. B-266114 (Apr. 12, 1996) *aff'd*, Defense Office of Hearings and Appeals, Claims Case No. 96081208 (Dec. 20, 1996). The opinion stated:

> [T]he services state[d] that they developed the 10 percent based on factors which we agree fall within those discussed in *Fogarty*, while the carrier simply wishe[d] to apply a 50 percent rate applicable to phonograph records without giving any weight to the distinguishing differences affecting the values of the two items. In such circumstances, the carrier ha[d] not shown that the service ha[d] acted unreasonably in applying the 10 percent depreciation rate to calculate the value of the lost tapes [sic]. In the absence of clear and convincing evidence that an agency acted unreasonably, we will not question the agency's valuation of loss or damage to household goods.

136. *See* Personnel Claims Note, *The Estimate of Repair: What Should It Provide?*, ARMY LAW., May 1995, at 75. This note presents a very good, detailed discussion of what a field claims office should require in an estimate of repair.

137. *See* Valdez Transfer, Inc., Comp. Gen., B-197911.8 (Nov. 16, 1989) (unpub.) (A carrier is not liable for damage to an item if the damage is not shown to be greater than the preexisting damage to that item, as noted on the inventory prepared at origin.).

138. *See* GAO Settlement Certificate, Z-2867005 (July 24, 1992); Household Goods Recovery Notes, *Digests of Recent Comptroller General and GAO Decisions*, ARMY LAW., Dec. 1992, at 36.

139. *See* Allied Intermodal Forwarding, Inc., Comp. Gen., B-258665 (Apr. 6, 1995) (The carrier's liability should have been limited to the depreciated replacement cost, which was less than the depreciated repair cost.).

140. Beach Van & Storage, Comp. Gen., B-234877 (Dec. 11, 1989). *See* American Van Serv., Inc., Comp. Gen., B-259198 (May 5, 1995); Midwest Moving and Packing, Comp. Gen., B-256603.2 (May 3, 1995); Andrews Forwarders, Inc., Comp. Gen., B-257613 (Jan. 25, 1995).

The Joint Defense Doctrine: Getting Your Story Straight in the Mother of All Legal Minefields

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Phoenix, Arizona

Introduction

Oftentimes, situations arise when several servicemembers become the focus of a criminal investigation or face the prospect of a court-martial. Under such circumstances, defense counsel may wish to pursue a mechanism by which they can share important information, increase the level of cooperation, work to present a coherent and consistent defense, share the expense of expert witnesses or consultants, and generally present a unified front.[1] However, defense counsel may be hesitant to do so for fear of disclosing confidential communications or tipping off the prosecution to trial strategy.

The joint defense privilege[2] provides an effective means by which attorneys representing multiple clients can pool resources to meet a common legal threat. Indeed, the doctrine's "purpose is to encourage interparty communications such that the parties receive effective legal representation as well as to facilitate a just determination of the case."[3] To facilitate that laudatory purpose, the doctrine provides an evidentiary privilege to protect confidential communications among the co-accused and their counsel. In effect, it extends the attorney-client privilege to cover not just the attorney and client, but also *all* co-accused and their attorneys. Further, formal joint defense agreements provide a means of memorializing the exact terms of the common defense relationship, prior to entering into such an arrangement.[4]

Although commonly seen in federal drug and white collar crime cases,[5] such as corporate, environmental,[6] and procurement fraud prosecutions,[7] the joint defense privilege and formalized joint defense agreements rarely appear in the military justice system. Because the military courts recognized the privilege over twenty years ago,[8] and the military rules of evidence specifically provide for the privilege,[9] the paucity of relevant military case law suggests that the privilege is relatively

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1. Paul L. Perito, et. al., *Joint Defense Agreements: Protecting the Privilege, Protecting the Future*, 4 CRIM. JUST. 6 (Winter 1990); Gerald F. Uelmen, *The Joint Defense Privilege: Know the Risks*, 14 LITIG. 35, 38 (Summer 1988).

2. The joint defense privilege has also been referred to as the "common interest privilege" and the "pooled information situation." *In re* Megan-Racine Assoc., Inc., 189 B.R. 562, 570 n.4 (Bankr. N.D.N.Y. 1995). Further, the joint defense doctrine has been referred to as "the 'allied lawyer' doctrine." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-395 (1995).

3. *In re* Megan-Racine Assoc., 189 B.R. at 571; *see also* United States v. DeNardi Corp., 167 F.R.D. 680, 686 (S.D. Cal. 1996) ("The rationale for the privilege is clear: Persons who share a common interest in litigation should be able to communicate confidentially with their respective attorneys, and with each other, to more effectively prosecute or defend their claims."); Note, *Separating The Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 TEX. L. REV. 1273, 1280 (1990) [hereinafter Note] ("The policy underlying the joint-defense privilege, then, is to promote the general efficiency of legal representation by giving parties the tactical advantage of access to information in the possession of others.").

4. Many lawyers are no longer satisfied with informal, oral agreements and are insisting that the entire agreement be reduced to writing. Michael G. Scheininger & Ray A. Aragon, *Joint Defense Agreements*, 20 LITIG. 11 (1994). Two legal commentators suggest that the terms of the agreement include:

> that the parties share a common interest; that the information exchanged falls within the attorney-client privilege and work product doctrine; that information is being exchanged solely to further common interests in connection with a particular matter; that information cannot be disclosed to third parties without the express consent of the party providing the information; that if any party receives a subpoena or other legal demand for materials provided under the agreement, that party must give notice to the party who provided the materials; that no party is required to share all information; and that nothing in the agreement precludes independent and separate representation of the best interest of one's client.

Thomas W. Hyland & Molly Hood Craig, *Attorney-Client Privilege and Work Product Doctrine in the Corporate Setting*, 62 DEF. COUNSEL J. 553, 561-62 (Oct. 1995).

5. Robert S. Bennett, *Foreword to the Eighth Survey of White Collar Crime*, 30 AM. CRIM. L. REV. 441, 442, 450-51 (1993); *see also* Scheininger & Aragon, *supra* note 4, at 11 (Joint defense agreements "have become a staple of white collar litigation.").

6. Francis J. Burke Jr., et al., *Responding to a Government Environmental Investigation: Shaping the Defense*, 34 ARIZ. L. REV. 509, 538 (1992).

7. Many defendants in the Operation Ill Wind prosecutions entered into joint defense agreements. *See* ANDY PASZTOR, WHEN THE PENTAGON WAS FOR SALE 283, 287 (1995). Operation Ill Wind was the DOJ's most successful procurement fraud prosecutorial effort, generating convictions of forty-five individuals and six corporations and over $225 million in fines. Michael S. McGarry, *Winning The War on Procurement Fraud: Victory at What Price?*, 26 COLUM. J. L. & SOC. PROBS. 249, 277 (1993).

8. United States v. Brown, 20 C.M.R. 823 (A.F.B.R. 1955) (recognizing the privilege, but determining it did not apply under the particular facts of this case).

unknown within the military legal community. This article seeks to inform military attorneys of the joint defense doctrine's current legal status and to highlight its various advantages and dangers.

The Joint Defense Privilege

The joint defense privilege is an extension of the attorney client privilege and "protects communications between an individual and an attorney for another when the communications are 'part of an on-going and joint effort to set up a common defense strategy.'"[10] The privilege "only protects communications between joint defense attorneys, or between a joint defense member (i.e., a target or defendant) and one or more of the joint defense attorneys."[11]

The privilege is not invoked when a single attorney represents multiple parties[12] or when multiple defendants without their attorneys present shared information.[13] Further, the joint defense privilege is not automatically triggered merely because an attorney represents one of several coaccused[14] or when that attorney interviews an unrepresented potential codefendant.[15] Further, the privilege does not protect confidential business communications in which legal concerns are peripheral.[16]

The privilege applies to both civil and criminal cases,[17] and it first appeared in published case law in 1871.[18] The privilege was subsequently recognized in published decisions by the miltary in 1955[19] and by the federal system in 1964.[20] Cur-

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9. Military Rule of Evidence 502 provides, in relevant part: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest . . . ." MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 502(a)(3)(1995) [hereinafter MCM]. Military Rule of Evidence 502(a) was taken from proposed Federal Rule of Evidence 503. *Id.* at 502 analysis, app. 22, A22-37.

10. United States v. Bay State Ambulance And Hosp. Rental Serv., 874 F.2d 20, 28 (1st Cir. 1989) (citations omitted); *see also* United States v. Moss, 9 F.3d 543, 550 (6th Cir. 1993). The joint defense privilege also applies to the attorney work product doctrine. *In re* Imperial Corp. of Am., 167 F.R.D. 447, 455 (S.D. Cal. 1995); *see also In re* Megan-Racine Assoc., Inc., 189 B.R. 562, 570 (Bankr. N.D.N.Y. 1995) ("Most commentators and courts view it as an extension of the attorney-client privilege or work-product doctrine.").

11. Matthew D. Forsgren, *The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine*, 32 CRIM. L. REV. 217, 229 n.71 (1995) (citation omitted) (originally published in 78 MINN. L. REV. 1219 (1994)). When a party to a joint defense arrangement provides information to a codefendant's attorney, it is not necessary that the party's own attorney be present to enjoy the protection of the joint defense privilege. Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 391 (S.D.N.Y. 1975).

12. Walsh v. Northrop Grumman Corp., 165 F.R.D. 16, 18 (E.D.N.Y. 1996) ("limited to situations where multiple parties are represented by separate counsel . . . ."). A similar, but analytically separate, privilege exists when a single attorney represents multiple clients. United States v. Nelson, 38 M.J. 710, 715 (A.C.M.R. 1993); s*ee* Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995) ("joint client doctrine"). *But cf.* Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 446-47 (S.D.N.Y. 1995) (merging the two doctrines).

13. United States v. Gotti, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) (The privilege does not extend to conversations among the defendants when no attorney is present.); *see also* Forsgren, *supra* note 11, at n.71 ("The doctrine does not protect communications between members outside the presence of their attorneys.") (citations omitted); Perito, *supra* note 1, at 7 ("The joint defense privilege does not protect conversations between defendants outside the presence of counsel . . . ."); Note, *supra* note 3, at 1295 (Client-to-client communication is not protected because it "does not fit within any logical extension of the attorney-client privilege.") ("In addition, Proposed Rule 503(b)(3) . . . did not include client-to-client exchanges among protected exchanges.").

14. *See* United States v. Brown, 20 C.M.R. 823, 832-33 (A.F.B.R. 1955) ("Just because an attorney represents one of several co-accused, he does not automatically become by operation of law an attorney for all accused who constitute the side.").

15. Government of Virgin Islands v. Joseph, 685 F.2d 857 (3d Cir. 1982). Generally, federal courts have upheld the joint defense privilege when "a confidential relationship was found to exist, the defendants either had retained counsel who were present during the communications or the defendants had not retained counsel but were planning to join the defense team." United States v. Lopez, 777 F.2d 543, 553 (10th Cir. 1985).

16. *Walsh*, 165 F.R.D. at 18; *Bank Brussels*, 160 F.R.D. at 447 ("The doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation."); *see In re* Imperial Corp. of America, 167 F.R.D. 447, 455-56 (S.D. Cal. 1995).

17. *In re* LTV Securities Litigation, 89 F.R.D. 595, 604 (N.D. Tex. 1981); *Bank Brussels*, 160 F.R.D. at 447 ("Although originally developed in the context of cooperation between codefendants in criminal cases, this extension of the doctrine is fully applicable to parties in civil cases as well."); Hicks v. Commonwealth, 439 S.E.2d 414, 416 (Va. Ct. App. 1994) (civil or criminal, plaintiffs or defendants); Visual Scene, Inc. v. Pilkington Brothers, 508 So.2d 437, 439 n.2 (Fla. Dist. Ct. App. 1987) ("Although less frequently seen, the 'common interests' privilege also applies to co-plaintiffs."); *see, e.g.*, United States v. Moss, 9 F.3d 543, 550 (6th Cir. 1993) (criminal); Matter of Bevill, Bresler & Schulman Asset Manag. Corp., 805 F.2d 120 (3d Cir. 1986) (bankruptcy); *see also* Burke, *supra* note 6, at 538 n.166 ("applicable in both civil and criminal settings").

18. Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822 (1871); Burke, *supra* note 6, at 539 ("In this country, the recognized wellspring of the joint defense doctrine is *Chahoon v. Commonwealth*.").

19. United States v. Brown, 20 C.M.R. 823 (A.F.B.R. 1955). The only other published military decision addressing a joint defense relationship is *United States v. Romano*, 43 M.J. 523 (A.F. Ct. Crim. App. 1995), *review granted* 44 M.J. 76 (1996). Neither case provides a detailed discussion of the joint defense doctrine in the military context.

rently, the joint defense privilege enjoys widespread acceptance within the American legal system.[21]

Because the joint defense privilege is an extension of the attorney-client privilege, courts require as a condition precedent to the applicability of the joint defense privilege that the confidential information fall under the protective umbrella of the attorney-client privilege or attorney work product.[22] "In other words, it confers no independent privileged status to documents or information."[23]

In the federal system, the privilege applies at the preindictment, investigatory stage, as well as after formal indictment.[24] By analogy, the military version of the privilege applies prior to preferral of charges, as well as after preferral or referral of charges. Indeed, the privilege should apply as soon as servicemembers reasonably suspect that they are, or will become, the objects of a criminal investigation.[25]

Once properly invoked, the privilege's scope is broad. It is not limited to confidential communications dealing specifically with trial strategy; the protection extends to general information shared between the parties that may prove useful in either present or future proceedings.[26] Indeed, federal courts "have extended the privilege to virtually any exchange of information among clients and lawyers on the same side of the case."[27] For example, courts have extended the privilege's protection to memoranda of grand jury witness testimony exchanged by counsel,[28] interclient communication in the presence of counsel,[29] and correspondence exchanged in an effort to organize a joint defense.[30]

It is uncertain whether the privilege protects the joint defense agreement itself, and the case law addressing this issue is almost nonexistent. Indeed, the author was able to discover only two unpublished decisions, both holding that such agreements were protected from disclosure.[31] In both cases, the courts opined that disclosure of the joint defense agreements would impermissibly reveal defense strategy.[32]

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20. Burke, *supra* note 6, at 540 (citing Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964)). The privilege is now accepted throughout the federal court system. *Id*. at 539.

21. Metro Wastewater Reclamation District v. Continental Casualty Co., 142 F.R.D. 471, 478 (D. Colo. 1992) ("widely accepted by courts throughout the United States"); *see* People v. Pennachio, 637 N.Y.S.2d 633, 634 (Sup. Ct., Kings County, 1995) (privilege exists in Virginia, Minnesota, Florida, Arkansas, Hawaii, Louisiana, Nevada, Oregon, South Dakota, Texas, and Wisconsin); State v. Maxwell, 691 P.2d 1316 (Kan. Ct. App. 1984) (privilege exists in Kansas). *But cf.* Raytheon Co. v. Superior Court, 256 Cal. Rptr. 425, 429 (Cal. Ct. App. 1989) ("There is no 'joint defense privilege' as such in California . . . .").

22. *Metro*, 142 F.R.D. at 478; *see also In re* Grand Jury Subpoenas, 89-3 and 89-4, 902 F.2d 244, 249 (4th Cir. 1990) ("presupposes the existence of an otherwise valid privilege . . . ."); Sackman v. Liggett Group Inc., 167 F.R.D. 6, 19 (E.D.N.Y. 1996) ("[B]ecause the underlying communications were not subject to the attorney-client privilege, they do not acquire a privileged status as a result of communications being jointly undertaken."); *In re* Megan-Racine Associates, Inc., 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995) ("The joint-defense privilege can only exist where there is an applicable underlying privilege, such as the attorney-client privilege or the work-product doctrine.").

23. *Metro*, 142 F.R.D. at 478.

24. Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965) (preindictment); *In re* LTV Securities Litigation, 89 F.R.D. 595, 604 (N.D. Tex. 1981) (available during a grand jury investigation); *accord* Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 447 (S.D.N.Y 1995). ("not necessary for litigation to be in progress," civil case).

25. *See* Chan v. City of Chicago, 162 F.R.D. 344, 346 (N.D. Ill. 1995) ("[T]here must be some realistic basis for believing that someone will become a joint defendant before a joint defense privilege can arise.").

26. Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965) ("general information which was needed to appraise the parties of the nature and scope of the Grand Jury proceedings, in order to facilitate representation in those proceedings and in any future proceedings"); *see also* Uelmen, *supra* note 1, at 36 (federal system's "broad construction of the joint defense privilege [which] extend[s] it to cases involving actual or even contemplated litigation . . . ."). *But cf.* at 36 (several states limit the privilege to "pending action").

27. Uelmen, *supra* note 1, at 36 (citing *e.g.* Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965)).

28. *Hunydee*, 355 F.2d at 185.

29. *In re* Megan Racine Assoc., Inc., 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995).

30. Eisenberg v. Gagnon, 766 F.2d 770, 787-88 (3d Cir.), *cert. denied sub. nom.* Weinstein v. Eisenberg, 106 S.Ct. 342 (1985).

31. United States v. BiCoastal Corp., No. 92-CR-261, 1992 WL 693384, at *6 (N.D.N.Y. Sept. 28, 1992); *The Business Crimes Hotline*, 2 BUS. CRIMES BULL.: COMPLIANCE & LITIG. 8 (Aug. 1995) (The New York State Supreme Court, New York County, held that the work product privilege protected disclosure of joint defense agreements, "as well as the mere fact of [their] existence . . . .") (citing In The Matter of the Two Grand Jury Subpoena Duces Tecum Dated January 5, 1995, S.C.I.D. No. 25016/95 (Roberts, J.)).

32. *BiCoastal Corp.*, 1992 WL 693384, at *6 (Disclosure of joint defense agreement "would be an improper intrusion into the preparation of the defendant's case."); *The Business Crimes Hotline*, *supra* note 31, at 8 (might reveal defense strategy).

On its face, a joint defense agreement merely evidences the creation and existence of an attorney-client relationship, which is generally not privileged.[33] However, if the agreement contains otherwise protected information, then the privilege applies, and the agreement may not be disclosed.[34]

Establishing the Privilege

Like any other privilege, the burden of establishing the joint defense privilege's applicability is on the party asserting it.[35] Specifically, the party claiming the privilege must establish "(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived."[36]

Communications Made in the Course of a Joint Defense Effort

To qualify for protection under the privilege, the communication must be made in confidence[37] and made at a time when a joint defense effort either existed[38] or was being organized.[39] For a joint defense effort to exist, the parties need only have some legal interests in common; their respective legal positions need not be entirely compatible.[40] Indeed, the parties' common interest may be a minor one.[41]

In *United States v. McPartlin*, several individuals were prosecuted for their involvement in a bribery scheme to obtain a multimillion dollar municipal contract.[42] Prior to trial, defendants Robert McPartlin and Frederick Ingram joined in an effort to discredit diaries corroborating the testimony of a key prosecution witness.[43] As part of that effort, Ingram's investigator interviewed McPartlin, with the consent of counsel; Ingram then attempted to use at trial certain admissions made by McPartlin during the interview.[44] On appeal, Ingram chal-

33. *See* Ralls v. United States, 52 F.3d 223, 225 (9th Cir. 1995) ("Generally, the attorney-client privilege does not safeguard against the disclosure of either the identity of the fee-payer or the fee arrangement."); Allen v. West Point-Pepperell Inc., 848 F. Supp. 423, 431 (S.D.N.Y. 1994) (retainer agreements and fee arrangements are not privileged); Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, (S.D.N.Y. 1994) ("attorney fee arrangements, including the general purpose of the work performed, are not generally protected from disclosure by the attorney-client privilege"); State v. Bilton, 585 P.2d 50, 51 (Or. Ct. App. 1978) (privilege does not extend to creation or existence of attorney-client relationship); SCOTT N. STONE & ROBERT K. TAYLOR, 1 TESTIMONIAL PRIVILEGES § 1.26, at 1-83 (2d ed. 1995) ("the existence of the attorney-client relationship is generally not a privileged matter").

34. *See Ralls*, 52 F.3d at 225 ("an attorney may invoke the privilege . . . if disclosure would 'convey information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client.'") (citation omitted); *Brooks*, 158 F.R.D. at 560 (Items that "reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege.") (citation omitted); STONE & TAYLOR, *supra* note 33, § 1.26 at 1-86 ("the substance of attorney-client communications, the client's motive for seeking legal advice, or details of the service provided . . .").

35. United States v. Moss, 9 F.3d 543, 550 (6th Cir. 1993); *see also* United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989), *cert. denied*, 502 U.S. 810 (1991); Matter of Bevill, Bresler & Schulman Asset Manag. Corp., 805 F.2d 120, 126 (3d Cir. 1986) (court held party did not meet burden); *see* Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 389 (S.D.N.Y. 1975) (parties conceded the issue).

36. *Matter of Bevill*, 805 F.2d at 126; *see also In re* Imperial Corp. of America, 167 F.R.D. 447, 455 (S.D. Cal. 1995); Dome Petroleum Ltd. v. Employers Mutual Liability Ins. Co. of Wis., 131 F.R.D. 63, 67 (D.N.J. 1990).

37. United States v. Bay State Ambulance and Hosp. Rental Serv., 874 F.2d 20, 28 (1st Cir. 1989); *see also In re* Megan-Racine Associates, Inc., 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995) ("the joint-defense privilege is only applicable where the party asserting it can demonstrate an agreement between the parties privy to the communication that such communication will be kept confidential"); *see* United States v. Nelson, 38 M.J. 710, 715 (A.C.M.R. 1993) (discussing attorney-client privilege generally).

38. *Dome Petroleum*, 131 F.R.D. at 67.

39. Eisenberg v. Gagnon, 766 F.2d 770, 787-88 (3d Cir.), *cert. denied sub. nom.* Weinstein v. Eisenberg, 106 S.Ct. 342 (1985) (communications privileged when "part of an ongoing and joint effort to set up a common defense strategy . . . ."); *see also* Metro Wastewater Reclamation District v. Continental Casualty Co., 142 F.R.D. 471 (D. Colo. 1992) ("must establish that . . . there was existing litigation or a strong possibility of future litigation . . . .").

40. United States v. McPartlin, 595 F.2d 1321, 1335-36 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); *see also* Griffith v. Davis, 161 F.R.D. 687, 692 n.6 (C.D. Cal. 1995) ("The interests of the parties involved in a common defense need not be identical, and, indeed, may even be adverse in some respects."); *In re* Megan-Racine Associates, Inc., 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995) ("courts have not required a total identity of interest among participants"); Visual Scene Inc. v. Pilkington Bros., 508 So.2d 437, 440 (Fla. Dist. Ct. App. 1987) (federal case law strongly suggests "that the common interests exception applies where the parties, although nominally aligned on the same side of the care, are antagonistic as to some issues, but united as to others"); Note, *supra* note 3, at 1291 ("Recently, courts have begun protecting communications regarding matters of common interest even when the parties' interests violently clash in other matters.").

41. *McPartlin*, 595 F.2d at 1335. In at least one case, a court upheld the applicability of the joint defense privilege to communications between a plaintiff and defendant in a multiparty civil case. *Visual Scene*, 508 So.2d at 441-42.

42. *McPartlin*, 595 F.2d at 1327.

43. *Id.* at 1335.

44. *Id.*

lenged the court's exclusion of this evidence based on the existence of an attorney-client privilege.[45]

Finding that a joint-defense privilege existed, the United States Court of Appeals for the Seventh Circuit rejected Ingram's argument that in order for such a privilege to apply "the co-defendant's defenses must be in all respects compatible . . . ."[46] To trigger the privilege, the codefendants need only have "*some* interests in common . . . ."[47] In *McPartlin*, the parties' common interest in discrediting one piece of evidence by one prosecution witness was enough.

Additionally, the common interests must be legal ones. The communications must relate to matters that may expose the parties to criminal or civil liability.[48] In *United States v. Aramony*, the United States Court of Appeals for the Fourth Circuit rejected the applicability of the joint defense privilege, holding that discussions designed merely to preserve "one's reputation is not a legal matter."[49]

Statements Designed to Further the Effort

Most courts construe this element broadly in favor of finding that the privilege exists. The confidential communications need not involve trial strategy or defenses; the mere pooling of general information or discussions of case-related matters of mutual interest is enough.[50]

However, the sharing of the confidential information must have been accomplished "for the purpose of mounting a common defense . . . ."[51] Communications concerning "matters of conflicting interest do not promote a common interest" and are not protected.[52] In *Vance v. State*,[53] the Supreme Court of Tennessee held the privilege inapplicable to certain admissions when the defendant held a conference with his co-defendant and their respective lawyers so that the defendant could plan *his* defense rather than planning a *joint* defense.[54]

Privilege Not Waived

The joint defense doctrine acts as an exception to the general rule that disclosure of confidential attorney-client communications to a third party waives the privilege[55] by extending the privilege to protect confidential communications made among a group of parties joined by a common interest.[56] Accordingly,

45. *Id.*

46. *Id.* at 1336.

47. *Id.* (citation omitted).

48. United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996).

49. *Id.*

50. Hunydee v. United States, 355 F.2d 183, 184-85 (9th Cir. 1965) (discussing, in part, Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964)).

51. Metro Wastewater Reclamation District v. Continental Casualty Co., 142 F.R.D. 471, 479 (D. Colo. 1992); *see also* United States v. Cariello, 536 F. Supp. 698, 702 (D.N.J. 1982) ("Communications among attorneys and codefendants are privileged only if the communications are designed to further a joint or common defense."); People v. Pennachio, 637 N.Y.S.2d. 633, 634 (Sup. Ct. Kings County 1995) ("Only those communications made in the course of an ongoing common enterprise intended to further the enterprise are protected.").

52. Note, *supra* note 3, at 1290.

53. 230 S.W.2d 987 (Tenn.), *cert. denied* 339 U.S. 988 (1950)

54. *Vance*, 230 S.W.2d at 991 (emphasis added).

55. "Regardless of the client's intention not to waive the privilege, the privilege will generally be deemed waived where confidential communications are disclosed, or allowed to be disclosed, to persons outside the professional attorney-client relationship." STONE & TAYLOR, *supra* note 33, § 1.45; *see* United States v. Nelson, 38 M.J. 710, 715 (A.C.M.R. 1993) ("As a general rule, disclosures in the presence of third parties destroys the confidentiality of the communication, thus rendering the communication unprotected by the privilege."); Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975) ("in general principle it is universally acknowledged, that communications between a client and his counsel in the presence of a 'third party,' i.e., one who stands in a neutral or adverse position vis-a-vis the subject of the communication, bespeaks the absence of such confidentiality and thus belies any subsequent claim to the privilege"); Visual Scene, Inc. v. Pilkington Bros., 508 So.2d 437, 439 (Fla. Dist. Ct. App. 1987) ("In most cases, a voluntary disclosure to a third party of the privileged material, being inconsistent with the confidential relationship, waives the privilege.").

56. *In re* LTV Securities Litigation, 89 F.R.D. 595, 604 (N.D. Tex. 1981) ("joint defense exception to the general rule that no privilege attaches to communications made in the presence of third parties"); *see also* Griffith v. Davis, 161 F.R.D. 687, 692 (C.D. Cal. 1995) (prevents waiver "to the extent confidential communications are shared between members of a joint defense."); *Visual Scene*, 508 So.2d at 439 (exception to the general waiver rule); *see* United States v. Romano, 43 M.J. 529 n.10 (A.F. Ct. Crim. App. 1995) (disclosure of communication between lawyers while engaged in cooperative defense did not waive the privilege); *Hunydee*, 355 F.2d at 184-85 (rejecting government's waiver arguments). Analogizing to the attorney-client privilege, "the joint-defense privilege operates as an exception to the rule that divulging confidential information to third parties waives the attorney-client privilege." Note, *supra* note 3, at 1278.

"communications by a client to his own lawyer remain privileged when the lawyer subsequently shares them with codefendants for purposes of a common defense."[57] Confidential communications remain privileged when revealed during a joint defense meeting to unrepresented nonparties as long as they share the common interest.[58]

In both the criminal and civil contexts, the privilege extends not only between actual codefendants, but also among *potential* codefendants, such as "co-respondents in a grand jury investigation."[59] Further, the privilege extends to members of a defense team. Confidential communications made to a joint defense attorney's investigator[60] and accountant[61] have been deemed privileged.[62]

Disclosure to a third party may waive the privilege.[63] However, as a general rule, a voluntary waiver of the joint defense privilege requires the unanimous consent of all participating members.[64] Absent such consent, an individual member of a joint defense group may only waive the privilege as to himself.[65] Remaining members of a joint defense relationship cannot preclude cooperating parties from revealing their own statements.[66]

In *Western Fuels Ass'n v. Burlington Northern R.R. Co.*,[67] the United States District Court for the District of Wyoming explained that a waiver of the privilege "relating to information shared in joint defense communications by one party to such communications will not constitute a waiver by any other party to such communications."[68] Otherwise, the vitality of a joint defense relationship would be vitiated "by the fear that a party

57. United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); Further, the privilege is not lost when the accused's lawyer makes an unauthorized disclosure to the lawyer of a joint defense coaccused. *Romano*, 43 M.J. at 528-29. "The lawyer-client privilege belongs to the client, not the lawyer." *Id.* at 528.

58. United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), *aff'd in part and vacated in part*, 109 S.Ct. 2619 (1989); Hicks v. Commonwealth, 439 S.E.2d 414 (Va. Ct. App. 1994) (presence of unrepresented, potential defendant did not defeat privilege).

59. *In re LTV Securities*, 89 F.R.D. at 604. The courts broadly define the term "codefendant" when determining the applicability of the joint defense privilege. *Id.*; *see also* Chan v. City of Chicago, 162 F.R.D. 344, 346 (N.D. Ill. 1995) ("courts have extended the privilege to potential defendants") (citation omitted).

60. *McPartlin*, 595 F.2d at 1336 (investigator working for codefendant's attorney interviewed defendant with consent of counsel).

61. United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989), *cert. denied*, 502 U.S. 810 (1991).

62. *Cf. In re* Megan-Racine Associates, Inc., 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995) (joint defense privilege "does not extend to communications made to representatives of quasi-legal professions unless such representatives act as *agents* for the attorney").

63. Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (privilege waived when privileged material "was shared with third-parties who were not pursuing a common legal strategy . . . ."); Western Fuels Ass'n v. Burlington Northern R.R.. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984) ("a party to joint defense communications may waive the attorney-client privilege by disclosing such confidential information to persons outside the scope of the joint defense relationship."); *see* United States v. Melvin, 650 F.2d 646 (5th Cir. 1981) ("there is no confidentiality when disclosures are made in the presence of a person who has not joined the defense team, and with respect to whom there is no reasonable expectation of confidentiality"); Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 393 (S.D.N.Y. 1975).

64. Metro Wastewater Reclamation District v. Continental Casualty Co., 142 F.R.D. 471, 478 (D. Colo. 1992) ("Waiver of the joint defense privilege requires the consent of all parties participating in the joint defense."); *see also* John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 556 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 1683 (1991); *In re* Grand Jury Subpoenas, 89-3 and 89-4, 902 F.2d 244, 248 (4th Cir. 1990) ("a joint defense privilege cannot be waived without the consent of all parties who share the privilege") (citing Chahoon v. Commonwealth, 62 Va. (21 Gratt) 822, 842 (1871)); United States v. BiCoastal Corp., 1992 WL 693384, at *5 (N.D.N.Y. 1992) ("the joint defense privilege cannot be waived without the consent of all parties to the defense."); *In re Megan-Racine*, 189 B.R. at 572 ("The joint-defense privilege cannot be waived unless all the parties consent or where the parties become adverse litigants.").

65. *Western Fuels Ass'n*, 102 F.R.D. at 203 ("waiver of privileges relating to information shared in joint defense communication by one party to such communications will not constitute a waiver by any other party to such communications"). Theoretically, "the joint-defense privilege protects communicated information from disclosure, compelled or otherwise, by the additional parties to whom a party has spoken and the other parties' lawyer." Note, *supra* note 3, at 1284. The comment to proposed Federal Rule of Evidence 503—upon which Military Rule of Evidence 502(a) is based—posited that a joint defense member held a privilege only as to his own statements. *Id.* at n.67 (citing FED. R. EVID. 503(b)(3) advisory committee's note, 51 F.R.D. 315, 364 (1971)); *see also* STEPHEN A. SALTZBURG ET. AL, MILITARY RULES OF EVIDENCE MANUAL, Editorial Comment to MIL. R. EVID. 502 at 546 (3d ed. 1991) ("each client has a privilege not to have his statements divulged"); Perito, *supra* note 1, at 8 ("Because the privilege belongs to the party originally making a communication, the privilege cannot be waived in the current litigation except by that party."); STONE & TAYLOR, *supra* note 33, § 1.55, at 1-149 ("a waiver by one does not effect a waiver as to the other's confidences").

66. Note, *supra* note 3, at 1293 (discussing Proposed FED. R. EVID. 503 advisory committee's note, 51 F.R.D. 315, 364 (1971)). "Indeed, if any party could invoke the shield of secrecy, forbidding other parties from repeating their own statements, the parties would not know whether they would be more helped or hurt by revealing information." *Id.* Joint defense members would "fear sharing any information that might benefit them later, because the other parties could prevent them from revealing the information in court.") *Id.* at 1293-94.

67. 102 F.R.D. 201 (D. Wyo. 1984).

68. *Id.* at 203 (citing Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980)).

to joint defense communications may subsequently unilaterally waive the privileges of all participants, either purposefully in an effort to exonerate himself, or inadvertently."[69] Accordingly, a party may only waive the privilege with respect to the information that party has provided, but not as to any information that party has received from other members of the joint defense group.[70]

Under the appropriate circumstances, courts will find a waiver of the privilege when parties to a joint defense relationship disclose confidential communications to a person outside the joint defense group—even a potential coaccused. In *United States v. Melvin*,[71] members of a joint defense group invited Charles Powell, a potential codefendant, to their meetings. All parties knew that Powell was unrepresented and had not agreed to any joint defense arrangement, but what they did not know was that Powell was acting as a government informant and was wearing a transmitter that permitted federal agents to record several conversations.[72]

The defendants persuaded the district court to dismiss the indictment, based on an impermissible government intrusion into the attorney-client relationship.[73] The United States Court of Appeals for the Fifth Circuit (Fifth Circuit) reversed and remanded, holding that a "communication is protected by the attorney-client privilege—and . . . from intrusion under the Sixth Amendment—if it is intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential."[74] The presence of a third party, "who has not joined the defense team, and with respect to whom there is no reasonable expectation of confidentiality," defeats the privilege.[75] The Fifth Circuit remanded, ordering the district court to determine whether, under the specific circumstances of the case, the joint defense defendants enjoyed a reasonable expectation of confidentiality in their conversations with Powell.[76]

Further, at least one court has held that conversations among codefendants outside the presence of *any* counsel are not privileged. In *United States v. Gotti*,[77] the defendants moved to suppress the results of electronic surveillance based, in part, on a violation of the joint defense privilege.[78] The federal district court rejected the challenge, refusing to extend the privilege to protect conversations between defendants in the absence of any attorney.[79]

The privilege dissolves as between any members of the joint defense arrangement that later face each other as adverse parties in subsequent litigation.[80] However, the litigation must be brought by one of the members to the joint effort; the privilege remains intact in any third-party proceeding.[81] Communication otherwise protected by the joint defense privilege does not lose its protected status solely because one of the joint defense members elects to cooperate with the prosecution and testify against the remaining defendants.[82]

Problem Areas for Both the Government and the Defense

Frequently, a defendant enters into some form of plea or cooperation agreement with the government that involves testi-

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69. *Id.* (citation omitted).

70. "Under [Mil. R. Evid. 502](a)(3), communications in a joint conference between clients and their respective lawyers may also be privileged; each client has a privilege not to have his statements divulged." SALTZBURG, *supra* note 65, at 546.

71. 650 F.2d 641 (5th Cir. 1981).

72. *Id.* at 642-43.

73. *Id.* at 643.

74. *Id.* at 645.

75. *Id.* 646.

76. *Id*. *But cf.* Hicks v. Commonwealth, 439 S.E.2d 414, 416 (Va. Ct. App. 1994) (presence of unrepresented, potential codefendant did not defeat joint defense privilege).

77. 771 F. Supp. 535 (E.D.N.Y. 1991).

78. *Id.* at 545. The electronic surveillance was part of an FBI investigation into organized crime in the New York City area. *Id*. at 538.

79. *Id.* at 545; *see also supra* note 13.

80. Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 393 (S.D.N.Y. 1975).

81. *Id.* at 395 ("i.e., before the Grand Jury").

82. *Cf.* United States v. Nelson, 38 M.J. 710, 715 (A.C.M.R. 1993) (citing, in part, Joseph A. Woodruff, *Privileges Under the Military Rules of Evidence*, 92 MIL. L. REV. 5, 18 (1981) ("opining that the exception to the [joint client] privilege contained in Mil. R. Evid. 502(d)(5) is wholly inapplicable to courts-martial because a criminal proceeding is never an action 'between' any of the clients").

mony against codefendants. When that cooperating defendant has previously been part of a joint defense effort, a number of problems arise for both prosecutors and defense counsel.

Conflict-Based Attorney Disqualifications

Because of access to privileged information, defense counsel for the noncooperating accused may be the object of a disqualification motion.[83] The prosecutor may seek to disqualify defense counsel on the basis that counsel may not use privileged information against a former coaccused or because the inability to use privileged information may inhibit the attorney's efforts to zealously represent his client.[84]

Since the defendant's Sixth Amendment right to effective assistance of counsel[85] is endangered by the potential conflict of interest, and, concomitantly, by the defense attorney's inability to zealously represent his client through effective cross-examination of the government's witness, the government may demand the disqualification of all remaining defense counsel privy to joint defense communication.[86] Military courts have held that trial counsel have an affirmative duty to bring any potential conflict of interest to the military judge's attention;[87] federal courts have admonished prosecutors for not doing so.[88] As a matter of trial strategy, trial counsel should seek judicial inquiry into the conflict issue and place any waiver on the record, to forestall subsequent appellate attacks.[89]

The Government's Position

The theory for disqualification discussed above is well grounded in the law. The law treats each attorney involved in the joint defense effort as representing *all* clients. As the Court of Appeals for the Third Circuit explained: "[t]he basic rationale of the . . . theory is that, when two codefendants decide to join in a common effort, 'the attorney for each represented both for purposes of that joint effort.'"[90]

If the codefendant—turned government witness—is considered to have been a joint defense attorney's former client, a potential conflict of interest exists.[91] An accused "is entitled to defense counsel free of conflicts of interest,"[92] and the courts

83. Uelman, *supra* note 1, at 36.

84. "The prosecution might argue successfully that you cannot stand in an adversarial relationship with a witness who has provided you with privileged information in confidence." *Id.* at 36; *see also* Forsgren, *supra* note 11, at 220 ("In such a case, the government claims that the remaining joint defense attorneys cannot remain in the case without violating their ethical duties to the former member."); Scheininger & Aragon, *supra* note 4, at 11; United States v. Baker, 10 F.3d 1374, 1399 (9th Cir. 1993) ("could thus have been faced with either exploiting his prior, privileged relationship with the witness or failing to defend his present client zealously for fear of misusing confidential information").

85. The Sixth Amendment guarantees a criminal defendant "the 'right to the assistance of an attorney unhindered by a conflict of interest.'" United States v. Agosto, 675 F.2d 965, 969 (8th Cir.), *cert. denied*, 459 U.S. 834 (1982) (citing Cuyler v. Sullivan, 446 U.S. 335 (1980) (Marshall, J., concurring in part and dissenting in part)); *see also* United States v. Met, 65 F.3d 1531, 1534 (9th Cir. 1995); United States v. Levy, 25 F.3d 146, 152 (2d Cir. 1994). Generally, the term "conflict of interest" refers to the situation in which a lawyer has competing loyalties or duties between (1) current clients, (2) a former and current client or (3) the attorney and a client. The Army's conflict rules are contained in rules of Professional Conduct 1-7 through 1-9. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 June 1992) [hereinafter AR 27-26].

86. Forsgren, *supra* note 11, at 220 & n.16 ("A conflict of interest therefore may prevent the joint defense attorney from rigorously cross-examining the government witness, which in turn may deny the defendant effective assistance of counsel in violation of the Sixth Amendment.") (citing United States v. Agosto, 675 F.2d 965, 969-71 (8th Cir.), *cert. denied*, 459 U.S. 834 (1982)); *see Agosto*, 675 F.2d at 971 ("In the successive representation situation, privileged information obtained from the former client might be relevant to cross-examination, thus affecting advocacy in one of two ways: (a) the attorney may be tempted to use that confidential information to impeach the former client; or (b) counsel may fail to conduct a rigorous cross-examination for fear of misusing his confidential information.").

87. United States v. Augusztin, 30 M.J. 707, 713 (N.M.C.M.R. 1990).

88. United States v. Stantini, 85 F.3d 9, 13 (2d Cir. 1996) ("We therefore reiterate our admonition to the government in earlier cases to bring potential conflicts to the attention of trial judges."). Additionally, defense counsel possess a "duty to avoid conflicts of interest and to advise the court promptly upon discovery of a conflict . . . ." United States v. Fish, 34 F.3d 488, 493 (7th Cir. 1994).

89. *See Stantini*, 85 F.3d at 13 ("Convictions are placed in jeopardy and scarce judicial resources are wasted when possible conflicts are not addressed as early as possible."). When an actual conflict of interest exists, the accused "need not show prejudice in order to obtain a reversal of his conviction." *Augusztin*, 30 M.J. at 715. Further, [i]n view of the potential for prejudice when a defense counsel has divided loyalties, and in the absence of the informed consent of the accused, the prejudice is automatic. *Id*. Most conflict of interest issues are first raised on appeal, where the defendant is seeking a reversal of the conviction. *Agosto*, 675 F.2d at 970.

90. Government of Virgin Islands v. Joseph, 685 F.2d 857, 862 (3d Cir. 1982); *see also* United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979) ("the attorney for each represented both for purposes of that joint effort."); Wilson P. Abraham Const. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977); Note, *supra* note 3, at 1277 ("the attorney for one client becomes the attorney for all clients . . . ."). Some courts follow a slightly different rationale, reasoning that the third-party recipient of the confidential information acts as a representative of the client's attorney, that is, part of the client's defense team. Note, *supra* note 3, at 1277.

91. *See Agosto*, 675 F.2d at 971 ("When an attorney attempts to represent his client free of compromising loyalties, and at the same time preserve the confidences communicated by a present or former client during the representation in the same or a substantially related matter, a conflict arises.") (citing Canon 4 & 5 of the ABA Code of Professional Responsibility) (multiple or successive representations).

presume the accused has not waived this right.[93] The military judge has a duty to inquire into possible conflicts of interest[94] and must dismiss the defense counsel from the case when an actual conflict exists, regardless of the accused's desires.[95] Indeed, even a "serious potential conflict" may necessitate disqualifying counsel.[96]

A strict interpretation of the conflict of interest rule may compel disqualification even though the confidential relationship has been terminated[97] and counsel acquired no information that could actually harm the former client.[98] However, the prevailing rule is that the attorney subject to a disqualification motion must actually have been privy to confidential information as a result of the joint defense relationship.[99]

Opposition to Disqualification

Opponents of disqualification argue that "disqualification not only impinges on a defendant's Sixth Amendment right to counsel of choice, it also threatens the very existence of joint defense arrangements, which serve important purposes in complex criminal cases."[100] Indeed, prosecutors could unfairly "eliminate a whole squadron of lawyers simply by turning one codefendant."[101] Further, "disqualification unfairly denies the right to counsel of choice to individuals who retain separate attorneys specifically to avoid conflicts of interest that multiple representation would otherwise present."[102]

Ethical Guidance

When deciding conflict of interest issues, courts look not only to the Sixth Amendment but also to applicable ethical standards.[103] The Army's Rules for Professional Conduct for Lawyers may require disqualification of the joint defense attorney.[104] Rule 1.9 (a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:

92. United States v. Caritativo, 37 M.J. 175, 178 (C.M.A. 1993); *see also* Wood v. Georgia, 450 U.S. 261, 271 (1980) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."). Regardless of the type of representation giving rise to the potential conflict—successive, multiple, or part of a joint defense relationship—the same general body of conflict of interest law applies. *See* United v. Levy, 25 F.3d 146, 153 n.5 (2d Cir. 1994) ("This Circuit . . . has not questioned the universal applicability of the Supreme Court's conflicts precepts and has consistently applied the same basic doctrine in all conflict-of-interest situations.").

93. United States v. Augusztin, 30 M.J. 707, 711 (N.M.C.M.R. 1990). Any waiver of conflict-free counsel must be voluntary, knowing, and intelligently made. *Id.* at 712. The "military judge alone . . . is responsible to undertake such an inquiry of the accused to determine whether there is a voluntary, knowing and intelligent relinquishment of his right to conflict-free counsel . . . ." *Id.* at 714.

94. United States v. Davis, 3 M.J. 430, 432-34 (C.M.A. 1977) (on the record inquiry required); *see also Wood*, 450 U.S. at 272 (possibility of conflict generates duty to inquire); *see* R.C.M. 901(d)(4) Discussion. Likewise, in the federal system, judges must inquire into possible conflicts of interest. United States v. Fish, 34 F.3d 488, 492 (7th Cir. 1994) ("the judge must inquire adequately into the potential conflict."); United States v. Levy, 25 F.3d 146, 153 (2d Cir. 1994) ("When a district court is sufficiently apprised of even the possibility of a conflict of interest, the court first has an 'inquiry' obligation.").

95. *See* Wheat v. United States, 486 U.S. 153, 162 (1988); *Augusztin*, 30 M.J. at 714-15.

96. *Wheat*, 486 U.S. at 164; *Augusztin*, 30 M.J. at 715; United States v. Baker, 10 F.3d 1374, 1399 (9th Cir. 1993); United States v. Kenney, 911 F.2d 315, 321 (9th Cir. 1990); United States v. Vasquez, 995 F.2d 40, 42 (5th Cir. 1993). A "remote possibility of conflict" does not warrant disqualification. *Agosto*, 675 F.2d at 972.

97. "Once a confidential relationship exists, the attorney ordinarily cannot act in a manner inconsistent to the client's interest in the same or any other matter related to the subject of the confidence. This is so even if the relationship then existing at the time of the disclosure was subsequently terminated." United States v. Hustwit, 33 M.J. 608, 613 (N.M.C.M.R. 1991).

98. United States v. McKee, 2 M.J. 981, 983 (A.C.M.R. 1976) ("The rule regarding conflicts of interests has been so strictly enforced that a lawyer cannot thereafter act as counsel against his former client in the same general matter even though while acting for his former client he acquired no knowledge which could adversely affect his former client in the subsequent adverse employment.") (citing United States v. Green, 18 C.M.R. 234, 238 (C.M.A. 1955)); *see also* United States v. Hustwit, 33 M.J. 608, 615 (N.M.C.M.R. 1991); United States v. Diaz, 9 M.J. 691, 693 (N.M.C.M.R. 1980). *But cf. Agosto*, 675 F.2d at 973 (court should seek a means of limiting the potential conflict short of disqualification).

99. Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 609 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978); Wilson P. Abraham Constr. Corp. v. Armco Steel Corp. 559 F.2d 250, 253 (5th Cir. 1977) ("there is no presumption that confidential information was exchanged as there was no direct attorney-client relationship . . ." and an attorney "should not be disqualified unless the trial court should determine that [the attorney] was actually privy to confidential information."); Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 132 (Tex. App. 1995) (following federal precedent). *But cf.* United States v. Cheshire, 707 F. Supp. 235, 239 (N.D. La. 1989).

100. Forsgren, *supra* note 11, at 221.

101. Uelman, *supra* note 1, at 38.

102. Forsgren, *supra* note 11, at 221; *accord* Note, *supra* note 3, at 1283.

103. *See, e.g.*, *Wheat*, 108 S.Ct. at 1697; *Agosto*, 675 F.2d at 973; United States v. Cheshire, 707 F. Supp. 235 (N.D. La. 1989). A litigant may possess an independent basis to seek disqualification of an attorney pursuant to state ethics rules. United States v. Mett, 65 F.3d 1531, 1537 (9th Cir. 1995) ("A litigant may have a right to conflict-free counsel based on state professional ethics rather than the Sixth Amendment. If attorneys appearing before a federal court are bound by a certain body of state ethics rules, litigants may seek disqualification of other parties' attorneys in the same proceeding for violation of the conflicts provisions of those rules.")

> (1) represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the client unless the former client consents after consultation; or
>
> (2) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.[105]

Thus, Rule 1.9, which was designed to protect clients,[106] provides two ethical prohibitions: (1) adverse representation and (2) disadvantageous use of confidential information. The first prong prohibits an attorney from representing a second client when that client's interests are adverse to a former client whom the attorney represented in the same or a substantially related matter. Interests may be "materially adverse" when a discrepancy in testimony exists between the clients, when positions become incompatible at trial, or when the clients face substantially different degrees of liability.[107] When a former client appears at trial as an important prosecution witness against the current client, the interests of the two clients should be deemed materially adverse.[108] However, the former client may waive the disqualification after full disclosure.[109]

The second prong prohibits the use of confidential information against the former client.[110] Indeed, the comment to Rule 1.9 states: "Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client."[111]

In the likely absence of a waiver by the cooperating former member of the joint defense effort, a reviewing authority must answer three inquiries: (1) is the cooperating witness a former "client" for purposes of the conflict of interest rule; (2) was confidential information disclosed; and (3) if confidential information was disclosed, is disqualification required? Military ethical authorities have not addressed these issues in the joint defense scenario and Rule 1.9 does not appear to have been drafted with the joint defense doctrine in mind.

Arguably, a codefendant may be a client for purposes of invoking the privilege, but not for purposes of ethical analysis. The attenuated relationship between a defendant's attorney and other members of the joint defense group may not rise to the level protected by the Rules of Professional Responsibility.[112]

Further, Rule 1.9's temporal language suggests that the former client to whom an ethical duty is owed is not the typical joint defense coaccused. Basically, Rule 1.9 addresses whether a lawyer can represent client *B* if he has previously represented client *A*. However, in a joint defense scenario, the attorney already represents *B* at the time he creates an attorney-client relationship with coaccused *A*. All attorney-client relation-

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104. In determining conflict-of-interest issues, it is appropriate for courts to consider applicable ethical guidelines. *See e.g. Wheat*, 108 S.Ct. at 1697; United States v. Cheshire, 707 F. Supp. 235, 238-41 (N.D. La. 1989).

105. AR 27-26, *supra* note 85, Rule 1.9, at 13.

106. *Id.* Rule 1.9, cmt. ("Disqualification from subsequent representation is for the protection of clients . . . ."); *see* Major Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyer*, 124 MIL. L. REV. 1, 24 n.148 (1989) ("the disqualification rule is designed to benefit the former client . . . .").

107. *See* AR 27-26, *supra* note 85, Rule 1.7 cmt. at 12. Rule 1.9 refers to Rule 1.7 for a determination of adverse interests. The comment to Rule 1.9 states, "The principles in Rule 1.7 determine whether the interests of the present and former client are adverse."

108. Interpreting an identical Arizona Rule 1.9, the Arizona State Bar opined that when a former client will appear as a key prosecution witness against the attorney's present client, the interests of the two clients are materially adverse. The Bar opinion reasoned: the client's "objective at trial will be to discredit [the former client's] testimony in any way feasible, including the possible suggestion of [the former client's] own criminal culpability." Ariz. Ethics Op. 91-05, at 8 (Feb. 20, 1991).

109. Ingold, *supra* note 106, at 24. Not all conflicts may be waived; an attorney cannot properly seek a waiver "when a disinterested lawyer would conclude that the client should not agree to representation under the circumstances . . . ." AR 27-26, *supra* note 85, Rule 1.7 cmt. at 12; *see also* Professional Conduct Of Judge Advocates, Judge Advocate General Instruction 5803.1A, Rule 1.7, cmt. 4 (13 July 1992) [hereinafter Navy R.P.C.]; GARY L. STUART, THE ETHICAL TRIAL LAWYER 28.1, at 419 (State Bar of Arizona 1994) (Arizona Ethical Rule 1.7, cmt.). Further, in obtaining such consent, a lawyer may not approach the former client directly if that person is represented by another lawyer. AR 27-26, *supra* note 85, Rule 4.2 & cmt., at 26 ("This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.").

110. Rule 1.6 permits a lawyer to reveal confidential information if the client consents; and, without client consent, to prevent certain future criminal misconduct, in cases of certain lawyer-client controversies, or when required or authorized by law. AR 27-26, *supra* note 85, Rule 1.6, at 9. In the case of a codefendant cooperating with the prosecution, consent to reveal confidential information is unlikely and Rule 1.6's exception would normally be inapplicable. Some courts presume that an attorney has received confidential communications in the course of representation.

111. AR 27-26, *supra* note 85, Rule 1.9, cmt. at 14.

112. The comment to Rule 1.9 states that a reviewing body may examine the attorney's "degree" of representation. AR 27-26, *supra* note 85, Rule 1.9, cmt. at 14 ("The lawyer's involvement in a matter can also be a question of degree.").

ships, and all terminations of such relationships, have occurred in the same matter.

The comment to Rule 1.9 lends some support to this interpretation. Illustrations speak in terms of creating new attorney-client relationships after terminating a prior one. For example, "a lawyer could not properly seek to rescind on behalf of a *new* client a contract drafted on behalf of a former client."[113] Additionally, an attorney who represents an accused at trial cannot later represent a new client (the government), by serving as government counsel in the appellate review of the case.[114] Albeit the attorney's representation of the coaccused is not "wholly distinct" from the underlying controversy, but again, the representation has not risen to the level normally envisioned by the ethical rules.[115] In short, Rule 1.9 may not apply to joint defense relationships.

A recent opinion of the American Bar Association (ABA) applying substantially similar ethical rules offers only limited, and mixed, guidance. The ABA examined an attorney working in an insurance defense firm who had represented a member of a joint defense consortium, but who had left the firm and had been approached by a client seeking to file suit against other members of the consortium.[116] In a formal opinion, the ABA posited that the lawyer incurred an obligation to his former client not to disclose confidential information obtained as a result of the joint defense relationship unless the former client consented to disclosure.[117] However, the ABA's position differed with respect to the lawyer's obligation to other consortium members, who had provided information in confidence. The ABA opined that the lawyer had a "fiduciary obligation to the other members of the consortium, which might well lead to disqualification" but that the lawyer did not labor under an ethical obligation to the other consortium members.[118]

Key to the ABA's analysis was the fact that a joint defense agreement specifically stated that each lawyer did not represent the other members of the consortium.[119] Accordingly, the other members of the consortium were not the lawyer's former clients for purpose of the ethical analysis. The lack of an attorney-client relationship distinguishes the ABA opinion from the underlying premise of the joint defense doctrine that the law views each attorney involved in the joint defense effort as representing all clients.[120]

Relying on the ABA rationale, counsel may successfully argue that by entering into a formal joint defense agreement defining any attorney-client relationships, the parties to the agreement are beyond the reach of Rule 1.9. The counter argument is that the ABA opinion suggests that even if Rule 1.9 is inapplicable because the requisite attorney-client relationship does not exist, joint defense attorneys owe a fiduciary duty to codefendants that may necessitate disqualification.

Assuming arguendo that the cooperating coaccused is a client for Rule 1.9 purposes, an exchange of confidential communications must, exist prior to any potential conflict of interest. Although military courts have not addressed the issue, the weight of authority posits that there is no presumption that confidential information has been imparted as part of a joint defense relationship.[121] Accordingly, the military judge must conduct such an inquiry without revealing the substance of any privileged information to the government. In *United States v. Anderson*,[122] the United States District Court for the Western District of Washington satisfied its duty of inquiry by appointing an independent counsel. This attorney interviewed all relevant parties and prepared a report for the court, which was filed

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113. AR 27-26, *supra* note 85, Rule 1.9 cmt. at 14 (emphasis added); *see also id.* ("When a lawyer has been directly involved in a specific transaction, *subsequent* representation of other clients with materially adverse interests clearly is prohibited.") (emphasis added); *id.* ("The underlying question is whether the lawyer was so involved in a particular matter that the *subsequent* representation can be justly regarded as a changing of sides in the matter in question.") (emphasis added).

114. *Id.* ("So also a lawyer who has defended an accused at trial could not properly act as appellate Government counsel in the appellate review of the accused's case.").

115. The comment asks "whether the lawyer was so involved in a particular matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." AR 27-26, *supra* note 85, Rule 1.9 cmt. at 14. Typically, the accused's attorney continues to advocate the defense position; it is the cooperating co-accused who has moved from the defense camp into the government's camp.

116. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-395 (1995) [hereinafter ABA Formal Op. 95-395] ("Obligations Of A Lawyer Who Formerly Represented A Client In Connection With A Joint Defense Consortium").

117. *Id.* at 3.

118. *Id.; see* Wilson P. Abraham Const. v. Armco Steel Corp., 559 F.2d 250, 251 (5th Cir. 1977) (an attorney in a joint defense relationship breaches his "fiduciary duty" if he uses information obtained as a result of that relationship to the detriment of the codefendants).

119. ABA Formal Op. 95-395, *supra* note 116, at 1.

120. *See supra* note 85 and accompanying text.

121. *See supra* note 95.

122. 790 F. Supp. 231 (W.D. Wash. 1992).

under seal and reviewed in camera.[123] The district court then issued its opinion based on this report.

Finally, assuming the first two inquiries are answered affirmatively, the court must determine if disqualification is mandated. The military judge enjoys some discretion in this area. In *United States v. BiCoastal Corp.*,[124] the United States District Court for the Northern District of New York merged ethical and Sixth Amendment analysis, balanced the interests of all parties,[125] and eventually determined that the interests of the codefendants in retaining their counsel heavily outweighed any competing governmental interests.[126] In *Anderson*, the federal district court opined that even if confidential information was exchanged, it was not of sufficient importance to affect counsel's ability to effectively cross-examine the former joint defense member.[127]

It is significant that, even if not disqualified, counsel may not use confidential information obtained as a result of the joint defense relationship to the detriment of the cooperating witness. Of the three known federal decisions addressing the issue, all have recognized this restriction on counsel.[128]

Limited Case Precedent

On at least three occasions, federal prosecutors have been defeated in their efforts to disqualify opposing counsel because of a conflict of interest created by joint defense relationships.[129] Although in each case the government lost on the specific facts, the courts accepted the government's basic position that joint defense relationships can create conflicts of interest necessitating disqualification of counsel.[130] Accordingly, the issue remains ripe for litigation.

The Big Picture

In making a disqualification determination, a court must ultimately balance the rights and interests of the various parties, given the specific facts of the case. Permeating throughout that analysis is the particular jurisdiction's determination of the value associated with the particular privilege. Because they have recognized, but not interpreted, the joint defense privilege, military courts must determine how fervently military jurisprudence will embrace it.

Any evidentiary privilege is a reflection of society's balancing of various public policy considerations.[131] Arguably, joint defense relationships serve important public interests and should not be easily eviscerated by placing an unrestrained disqualification sword in the government's hands. Positive public policy considerations include encouraging litigants to reduce effort and costs by sharing limited resources;[132] facilitating the presentation of "a coherent and plausible defense rather than one riddled with immaterial inconsistencies;"[133] "encouraging full disclosure to attorneys in order to allow maximum legal representation";[134] and serving "to expedite trial preparation and the trial itself."[135]

Conversely, any privilege limits the factfinder's ability to ascertain the truth and should be interpreted narrowly.[136] Countervailing considerations against encouraging joint defense relationships focus on their potential for abuse. Joint defense

123. *Id.* at 232.

124. No. 92-CR-261, 1992 WL 693384 (N.D.N.Y. Sept. 28, 1992).

125. *Id.* at *2 ("The court must evaluate the interests of the defendant, the Government, the witness, and the public in view of the facts of the particular case.").

126. *Id.* at *3. In finding against disqualification, the court was impressed with the complex nature of the case and the lack of concern expressed by the former clients. *Id.* at *3-4.

127. United States v. Anderson, 790 F. Supp. 231, 232 (W.D. Wash. 1992).

128. *Id.*; *Bicoastal Corp.*, 1992 WL 693384 at *2; United States v. McDade, No. 92-249, 1992 WL 187036 (E.D. Pa. July 30, 1992).

129. Forsgren, *supra* note 11, at 238-39 (citing United States v. Anderson, 790 F. Supp. 231 (W.D. Wash. 1992); United States v. McDade, 1992 U.S. Dist. LEXIS 11447 (E.D. Pa. July 30, 1992); United States v. Bicoastal Corp., 1992 U.S. Dist. LEXIS 21445 (N.D.N.Y. Sept. 28, 1992)).

130. *Id.*

131. McCormick On Evidence § 72, at 171 (1984) ("Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice."). The rationale for protecting confidential communications, such as between an attorney and client, "is that public policy requires the encouragement of the communications without which these relationships cannot be effective." *Id, see also* Note, *supra* note 3, at 1287 ("balancing of the benefits and costs of recognizing the privilege.")

132. Uelman, *supra* note 1, at 38 ("public policy should encourage litigants to share the expense of consulting experts").

133. Perito, *supra* note 1, at 40.

134. *Id.*; *see also* Note, *supra* note 3, at 1287 ("the joint defense privilege spurs beneficial disclosures among parties with common interests . . .").

135. People v. Pennachio, 637 N.Y.S.2d 633, 635 (Sup. Ct. Kings County, 1995).

relationships permit defense attorneys to stymie the government's investigative efforts. Joint defense counsel can organize a unified defense, restrict the flow of information to government investigators while simultaneously sharing all available information among themselves, and resolve inconsistencies in the defense version of the facts, (i.e., get their stories straight).[137] Further, such relationships limit the government's ability to persuade individual defendants to testify against codefendants.[138]

Outside of the military, prosecutors view the joint defense doctrine with disfavor in part because of its inherently coercive nature in organizational settings. Typically, when a corporation learns it is under criminal investigation, key corporate employees are presented with the option of bearing their own legal expenses or accepting the services of an attorney chosen by—and friendly to—the corporation.[139] The corporation then enters into a joint defense arrangement with the individual attorneys.[140] In addition to bearing the potential burden of substantial legal fees, employees who elect not to cooperate in a joint defense run the risk of being viewed as disloyal, which may affect subsequent employment decisions such as promotions, transfers, or layoffs.

The factual scenario giving rise to concerns of abuse in a civilian organizational setting does not exist to the same extent in the military criminal context. Military accused are afforded free counsel, regardless of their income level, and employment decisions do not depend on acceptance of military attorneys. The two greatest mechanisms for controlling codefendants in organizational settings simply do not exist in the armed forces.

Improper Dissemination and Use of Privileged Information

An individual member of the joint defense effort may not unilaterally disclose confidential information received from other joint defense members.[141] However, preventing dissemination of privileged information to the government and enforcing any joint defense agreements may prove difficult for the defense.[142]

In *Kiely v. Raytheon Co.*,[143] a federal district court viewed the enforcement of a joint defense agreement as being contrary to public policy. John Kiely and his employer, Raytheon, entered into a joint defense agreement after learning that they were under investigation for "receiving and disseminating unreceipted classified DOD documents."[144] Kiely sued Raytheon, in part, for breach of contract after the defense contractor negotiated a plea agreement with the DOJ, without informing Kiely or his lawyer.[145]

The United States District Court for the District of Massachusetts dismissed the lawsuit, positing that any breach failed to cause Kiely any cognizable legal harm for which relief was available.[146] The court opined that performance of this type of contract "in accordance with the promises alleged would have interfered with a federal criminal investigation and would

136. McCormick on Evidence § 74 (1984) ("Since privileges operate to deny litigants access to every man's evidence, the courts have generally construed them no more broadly than necessary to accomplish their basic purposes.").

137. Bennett, *supra* note 5, at 450 ("A senior Department of Justice prosecutor explained '[p]rosecutors are uneasy because they see in [confidentiality agreements], even unintentionally, an opportunity to get together and shape testimony.'"); *see also* Forsgren, *supra* note 11, at 230-31 (Prosecutors argue that a "joint defense arrangement allows its members to shape testimony and perhaps even coordinate perjury.").

138. "Prosecutors do not like joint defense agreements for the same reason defense lawyers favor them: [t]hey can limit the pressure the government can bring to bear on an individual defendant, and they give individual defendants an overall view of multiparty cases." Scheininger & Aragon, *supra* note 4, at 11-12; *see also* Forsgren, *supra* note 11, at 231 (sophisticated criminals can prevent less culpable subordinates or coconspirators from cooperating with the government); *cf.* United States v. Dolan, 570 F.2d 1177, 1182 (3d Cir. 1978) (a single attorney representing multiple clients "creates the possibility of defendants 'stone-walling'—obstructing Government attempts to obtain cooperation of one of a group of defendants"). *Contra* Perito, *supra* note 1, at 40 (defendants are not barred from cooperating, they are only unable to disclose confidential information derived from the joint defense effort).

139. *See e.g.* Kiely v. Raytheon Co., 914 F. Supp. 708, 710 (D. Mass. 1996) ("Raytheon hired and paid for a lawyer to represent Kiely."). Usually, the corporation offers to indemnify the corporate employee for legal expenses, but only if the employee accepts an attorney chosen by the corporation. The corporation defends this practice on the grounds that corporate indemnification provisions require the offer of such legal representation and that the corporation should be able to pick a "qualified" attorney to fill that role.

140. *See, e.g.*, *Kiely*, 914 F. Supp. at 710.

141. *See supra* notes 64-66 and accompanying text.

142. "Though in theory former codefendants may be able to prevent one another from breaching a former joint defense privilege even before trial, that is a hard right to enforce. You simply cannot monitor [the former joint defense member] every minute. You may not be able to show that any given piece of prosecution knowledge came from a breach by [the former member]." Uelman, *supra* note 1, at 38.

143. 914 F. Supp. 708 (D. Mass. 1996).

144. *Id.* at 710.

145. *Id.* at 711. The day after Raytheon entered into the plea agreement, the DOJ indicted—and subsequently convicted—Kiely for conspiracy to defraud the United States in violation of 18 U.S.C. § 371. *Id.*

therefore have been contrary to public policy, if not actually illegal."[147] The court continued:

> An agreement by Kiely and Raytheon not to talk to the government without the other's consent would have given either a potential veto over the other's furnishing relevant, truthful information to investigators of criminal activity. Such a veto would obviously interfere with the investigation and might even in some circumstances amount to a criminal obstruction of justice. At the very least, it would present a sufficiently substantial impediment to the achievement of a desired public good that a contract arranging for such a veto power ought not to be sanctioned by enforcement.[148]

Although the remaining members of the joint defense group can prevent the cooperating witness from testifying as to any privileged matter and from introducing any privileged object or writing,[149] the defense may not be able to stop the former joint defense member from providing privileged information to the government. Attorney proffers and witness debriefings provide ample opportunity for privileged information to be disclosed.[150] However, this seemingly advantageous position for the prosecution may actually undermine the government's case.

Because the joint defense privilege is an extension of the attorney-client privilege, the defense could argue that the appropriate remedy for any unwarranted governmental intrusion into the joint defense relationship should parallel those remedies traditionally afforded to improper intrusions into the attorney-client relationship. Courts have excluded evidence after finding an improper intrusion into the attorney-client relationship on Fourth Amendment grounds, and as an infringement on the Fifth Amendment right to due process and the Sixth Amendment right to effective assistance of counsel.[151] A court may suppress not only evidence directly attributable to the Constitutional violation, but also any "fruits" or derivative evidence of the violation.[152]

While suppression of the evidence is the normal remedy, dismissal may be appropriate in extreme cases. In cases involving government intrusion into the attorney-client relationship violative of the Sixth Amendment, the defendant must establish demonstrable prejudice before dismissal is appropriate.[153] Additionally, a court may dismiss the case in particularly outrageous cases of governmental misconduct.[154] The outrageous conduct defense is premised on a Fifth Amendment due process violation.[155] For Fifth Amendment violations, dismissal may be appropriate "where continuing prejudice from the constitutional violation cannot be remedied by suppression of the evidence."[156] Such a violation is rare,[157] existing only when the

146. *Id.* at 713-14. The only harm suffered by Kiely was his inability to strike a bargain with the government before Raytheon. *Id.* at 714.

147. *Id.* at 713. Kiely alleged that a written agreement required the parties to preserve information as confidential. *Id.* Further, an additional oral agreement required the defense contractor to notify Kiely of an intention to enter into plea negotiations and to disclose information that the company intended to reveal to the DOJ. *Id.*

148. *Id.* at 714.

149. MCM, *supra* note 9, MIL. R. EVID. 501(b)(4); *see also* United States v. Stotts, 870 F.2d 288, 290 (5th Cir.), *cert. denied*, 493 U.S. 861 (1989) (codefendants precluded defendant from calling his former attorney to testify about statements made in a joint defense meeting concerning the defendant's innocence).

150. The military and federal systems recognize a crime fraud exception to the attorney client privilege. United States v. Smith, 35 M.J. 138, 140 (C.M.A. 1992) ("The lawyer-client privilege does not apply to 'communications . . . which further a crime or fraud.'") (citing United States v. Laurins, 857 F.2d 529, 540 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989)). This exception should apply to the joint defense privilege, particularly when the cooperating former joint defense member knows that other joint defense members are obstructing justice by hiding or destroying evidence; or providing false testimony in interviews, before the grand jury or in an Article 32 hearing.

151. Stone & Taylor, *supra* note 33, at 1-7 (citations omitted). "A Fifth Amendment due process violation may occur when government interference in an attorney-client relationship results in ineffective assistance of counsel or when the government engages in outrageous conduct." United States v. Marshank, 777 F. Supp. 1507, 1519 (N.D. Cal. 1991). If the misconduct occurs after the initiation of adverse criminal proceedings, government interference with the attorney client relationship may violate the Sixth Amendment right to counsel. *Id.* Further, the fruit of the poisonous tree exclusionary doctrine "applies to evidence obtained in violation of the Sixth Amendment right to counsel as well as the Fifth Amendment right to due process." *Id.* at 1519 n.11 (citations omitted).

152. People v. Pennachio, 637 N.Y.S.2d 633, 635 (Sup. Ct. Kings County, 1995) (in the context of a joint defense relationship, "if the defendants can show that the prosecutor interfered with their attorney-client relationship or otherwise show government misconduct, suppression of derivative evidence would be appropriate"); *see* United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989), *cert. denied*, 502 U.S. 810 (1991) (remanding to determine if government made derivative use of information protected by joint defense/attorney-client privilege).

153. United States v. Ofshe, 817 F.2d 1508, 1515 (11th Cir. 1987) (criminal defense attorney wore a "body bug" for government while talking to client) (citing United States v. Morrison, 449 U.S. 361 (1981)); *see also* United States v. Melvin, 650 F.2d 641 (5th Cir. 1981).

154. *See e.g. Marshank*, 777 F. Supp. at 1524 (dismissing indictment). "It is an accepted principle of due process that police misconduct may be so outrageous that the government will be absolutely barred from prosecuting the case." United States v. Langer, 41 M.J. 780, 784 (A.F. Ct. Crim. App. 1995).

155. United States v. Ahluwalia, 807 F. Supp. 1490, 1494 (N.D. Calif. 1992) *aff'd* 30 F.3d 1143 (9th Cir. 1994) (citing United States v. Russell, 411 U.S. 423 (1973)); *accord Langer*, 41 M.J. at 784.

government's misconduct is "fundamentally unfair and 'shocking to the universal sense of justice.'"[158]

Finally, confidential communications protected by the attorney-client privilege are inadmissible at trial and erroneous admission of such evidence may afford the accused an opportunity for post-trial redress. When the error is prejudicial, the findings of guilt may be set aside.[159] Harmless error may still cause a reassessment of the sentence.[160] For example, in *Hicks v. Commonwealth*,[161] the Court of Appeals of Virginia, finding prejudicial error, reversed a possession of heroin conviction after the trial judge erroneously admitted the defendant's confidential admissions to a codefendant's attorney, in violation of the joint defense privilege.[162]

When the government has not deliberately compelled the disclosure of information privileged by virtue of the existence of a joint defense relationship, suppression of evidence directly or indirectly obtained from such disclosure would be inappropriate and contrary to public policy.[163] Under such circumstances there is no governmental misconduct to deter.

Further, if the inadvertent or innocent receipt of privileged information threatens the government's case, prosecutors will be extremely hesitant to accept the cooperation of former joint defense codefendants. Under such circumstances, entering into a joint defense relationship will effectively bar future cooperation agreements[164] and ultimately threaten the continued existence of joint defenses in criminal cases. Defense counsel will be extremely hesitant to enter into any form of joint defense relationship that may eventually foreclose the possibility of securing an advantageous plea agreement.

Keeping the Genie in the Bottle

What can the military defense counsel for joint defense member *A* do to preclude either the government or counsel for joint defense member *B* from using privileged information in *B*'s Article 32 hearing and court-martial? In short, counsel should raise the privilege wherever and whenever possible.

Initially, *A*'s attorney should seek to preclude use of the privileged communication early in the criminal process by contacting both defense and trial counsel to make them aware of the issue and request that they not use the privileged communications. Counsel should remind trial counsel of the United States Court of Military Appeal's broad admonition in *United States v. Ankeny*, that the government is precluded from using improperly divulged privileged communications "in any way."[165] Further, *A*'s defense counsel should refer *B*'s counsel to Rules 1.6 and 1.9 of the *Army's Rules for Professional Conduct for Lawyers*, arguing that *A* was his client by virtue of the joint defense doctrine and that any unauthorized disclosure of joint defense communication would be unethical.

Nothing precludes *A*'s counsel from filing an objection to the use of the privileged information with *B*'s Article 32 investigating officer. The law of privileges applies during an Article 32 investigation,[166] and third parties may invoke the attorney-client privilege regarding their confidential communications.[167]

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156. *Marshank*, 777 F. Supp. at 1521-22 (citations omitted).

157. *Ofshe*, 817 F.2d at 1516 (invoked only "in the rarest and most outrageous of circumstances.").

158. *Marshank*, 777 F. Supp. at 1523 (citation omitted); *see also* United States v. Russell, 411 U.S. 423, 432 (1973); United States v. Bell, 38 M.J. 358, 373 (C.M.A. 1993) (Gierke, J., dissenting).

159. *See e.g. Nelson*, 38 M.J. at 716-17 (rape conviction reversed after communications protected by attorney-client privilege were erroneously admitted over defense objection); United States v. Moreno, 20 M.J. 623 (A.C.M.R. 1985) (premeditated murder conviction set aside after improper admission of confidential communication protected by clergy privilege).

160. United States v. Henson, 20 M.J. 620 (A.C.M.R. 1985) (attorney-client privilege); *see* United States v. Tipton, 23 M.J. 338, 345 (C.M.A. 1987) (marital privilege).

161. 439 S.E.2d 414 (Va. Ct. App. 1994).

162. *Id.* at 416.

163. *See* People v. Pennachio, 637 N.Y.S.2d 633, 637 (Sup. Ct. Kings County 1995) (the privilege "should not be extended to exclude evidence derived from a voluntary disclosure of privileged common interest communications").

164. United States Sentencing Guideline (U.S.S.G.) section 5 K1.1 provides that, upon motion by the United States, a court may depart downward from the sentencing guidelines to reflect the defendant's substantial assistance. Frequently, defendants seek to cooperate with the prosecution in order to reduce their sentences. A defendant's ability to earn a 5K departure may be adversely affected by his inability to testify about incriminating statements made by codefendants in joint defense meetings or about information obtained indirectly as a result of information obtained through the joint defense relationship.

165. 30 M.J. 10, 16 (C.M.A. 1990).

166. United States v. Martel, 19 M.J. 917, 922 (A.C.M.R. 1985); MCM, *supra* note 9, MIL. R. EVID. 1101(d).

167. United States v. Romano, 43 M.J. 523, 529 (A.F. Ct. Crim. App. 1995).

The right to assert the attorney-client privilege applies equally to nonparty joint defense members questioned about communications protected by the joint defense doctrine.[168] Acting on behalf of *A*, counsel should be able to lodge an objection with *B*'s investigating officer to preclude consideration of privileged communications even though *A* is not testifying at the proceeding.

Similarly, nothing in the *Manual for Courts-Martial* or military case law precludes *A*'s counsel from seeking appropriate relief at an Article 39(a) session before *B*'s military judge. Military Rule of Evidence 501(b) states that a claim of privilege may be raised " by *any* person" to "[p]revent another from being a witness or disclosing any matter or producing any object or writing." Indeed, Military Rule of Evidence 512(a)(2) contemplates the invocation of a privilege by a third party.[169]

Conclusion

The joint defense doctrine provides a potentially effective means for parties with common legal interests to organize their efforts and present a unified front in virtually any type of legal proceeding.[170] Joint defense relationships are particularly effective in criminal cases involving multiple accused. Defense counsel can monitor the flow of information to the prosecution, share information and resources among themselves, resolve insignificant factual inconsistencies or questions, identify and investigate important inconsistencies, and prepare a unified legal defense. In short, the joint defense doctrine contributes to the quality of legal representation.

However, joint defense relationships are fraught with potential problems. Defense counsel must ensure that the prerequisites for the privilege have been satisfied before exchanging information[171] and must be prepared to contend with the ethical and tactical problems associated with defecting joint defense members. Similarly, prosecutors should be prepared to meet the litigation challenges presented by a unified defense front and be cognizant of the legal issues raised once a joint defense member defects to the government.

The joint defense doctrine presents both advantages and danger to both sides of the bar and presents a fertile field for litigation. Ultimately, the military courts must determine the parameters of this legal doctrine.

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168. *Id.*

169. The rule provides, in relevant part: "The claim of privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party." MCM, *supra* note 9, MIL. R. EVID. 512(a)(2).

170. "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." FED. R. EVID. 1101(c); *see also* MCM, *supra* note 9, MIL. R. EVID. 1101(b) ("at all stages of all actions, cases, and proceedings"). In the federal system, privileges apply before the grand jury, extradition proceedings, criminal preliminary examinations, sentencing determinations, probation revocation proceedings, arrest and search warrant determinations and bail release proceedings. FED. R. EVID. 1101(d). The military rule of privilege applicability is equally broad. Privileges apply at all courts-martial, Article 39(a) sessions, Article 32 investigative hearings, Article 72 vacation of suspension proceedings, and pretrial restraint determinations. MCM, *supra* note 9, MIL. R. EVID. 1101.

171. Because of the judicial view that a joint defense attorney represents all joint defense members for purposes of the common defense effort (*see supra* note 90), the potential problems associated with the break up of joint defense relationships, and the assumption of additional obligations to other members of the joint defense effort by the accused's attorney, Army Rule 1.7 of the *Rules of Professional Conduct for Lawyers* may apply. Accordingly, an attorney should discuss with the client the possible disadvantages and additional obligations associated with joint defense relationships, and obtain the client's consent, before entering into such a relationship. *See* AR 27-26, *supra* note 85, Rule 1.7, at 11. Further, Rule 1.6(a) appears to mandate client consent before an attorney may reveal confidential communications to other joint defense counsel. *Id.* Rule 1.6, at 9 ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ."); *see Romano*, 43 M.J. at 529 n.10 ("obtain client consent before revealing information to another defense lawyer, even one whose client appears to be in concert of interest").

Memorandum of Law: *Trauvaux Preparatoires* and Legal Analysis of Blinding Laser Weapons Protocol

The first review conference for the 1980 United Nations Conventional Weapons Convention was held between 1994 and 1996. The States Parties (including the United States) adopted an Amended Protocol II on landmines, booby traps, and other devices, and a new protocol IV on blinding laser weapons. On 5 January 1997, President Clinton submitted both the Amended Protocol II and Protocol IV to the Senate for its advice and consent as to ratification. The following memorandum was prepared by Mr. W. Hays Parks, Special Assistant to The Judge Advocate General, Law of War Matters, who was the principal United States negotiator for the blinding laser protocol. It is a historical record and analysis of that protocol.

DAJA-IO (27-1a)
MEMORANDUM OF LAW
SUBJECT: *Travaux Preparatoires* and Legal Analysis of Blinding Laser Weapons Protocol

1. The first session of the United Nations Review Conference (Review Conference) of the States Parties to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (UNCCW) drafted and adopted a fourth protocol to that convention on blinding laser weapons. This memorandum has been prepared as a *travaux preparatoires* and legal analysis of that protocol.[1]

2. **Background**. The UNCCW is a treaty prepared by a United Nations conference bearing the same name as the title of the treaty, which met in Geneva between 1978 and 1980. It concluded its work on 10 October 1980, by adopting a convention and three protocols. Protocol I prohibits any weapon the primary effect of which is to injure by fragments not detectable by x-ray; Protocol II regulates the use of landmines, booby traps, and other devices; and Protocol III regulates the use of incendiary weapons. The UNCCW entered into force on 2 December 1983. The United States became a party to the Convention and its Protocols I and II on 24 September 1995, six months after deposit of its instrument of ratification.

By the terms of article 8, paragraph 3 of the convention, any State Party to the convention may call for a review conference ten years following its entry into force. On 9 February 1993, France made a request to the Secretary-General of the United Nations, in his capacity as depositary of the convention and its three protocols, to convene a review conference for the purpose of amending and updating Protocol II. On 16 December 1993, by its resolution 48/79, the General Assembly approved the request of the Secretary General to establish a group of governmental experts to prepare the review conference. On 22 December 1993, States Parties to the UNCCW submitted a letter to the Secretary-General, asking him to establish a group of experts to facilitate preparation for a review conference, and to convene a review conference. Four sessions of meetings of governmental experts preceded the convening of the Review Conference.

The regulation or prohibition of lasers has been the subject of international consideration for more than two decades. Discussions of lasers at conferences of government experts hosted by the International Committee of the Red Cross (ICRC) at Lucerne (1974) and Lugano (1976) to consider the legality of the use of certain conventional weapons were inconclusive. At the conference that drafted and adopted the UNCCW, a Swedish proposal to ban lasers received little support and was not accepted.

Following the 1980 conference, Bo Rybeck, Surgeon General of Sweden, tasked a Swedish Army officer to conduct a study of the military, medical, and legal consequences of battlefield use of lasers. The dissertation by Major General Bengt Anderberg formed the basis for a renewed effort by Sweden to regulate or prohibit the use of antipersonnel laser weapons or other lasers for systematic blinding of enemy combatants. When initial efforts (1986 to 1988) were unsuccessful, Sweden sought and gained the assistance of the ICRC. The ICRC hosted four meetings of experts on the subject between 1989 and 1991 and published a report in 1993 entitled *Blinding Weapons*. With the call by France for a Review Conference, Sweden and the ICRC initiated a major international effort to enlist support for a blinding laser weapon protocol.

The United States position from 1974 to 1995 did not favor a blinding laser weapon protocol. Unlike other conventional weapons under discussion, there was no evidence to support the threat voiced by Sweden.[2] Blinding is not a new battlefield

1. This memorandum is based on the author's participation as a member of the United States Delegation to the 1978-80 United Nations Conference that promulgated the UNCCW; as a United States representative in international meetings between 1986 and 1991 on the subject of a protocol on blinding lasers; as a member of the United States Delegation in discussions of this protocol in the four Meetings of the Group of Governmental Experts to Prepare the Review Conference of States Parties to the 1980 United Nations Conventional Weapons Convention (1994-95) that preceded the Review Conference; and participation in the same capacity in the first and final sessions of the Review Conference, which were held in Vienna from 24 September to 13 October 1995 and Geneva from 22 April to 3 May 1996, respectively.

2. To date, there is no record of a case of a battlefield laser causing permanent blindness, as the term blindness is defined in Protocol IV.

phenomenon, and blinding by a laser was not viewed as worse than other, lawful mechanisms for causing blinding, other injury, or death to combatants.

Lasers had become essential tools on the modern battlefield, enhancing communication, rangefinding, and weapons guidance. Laser programs to counter enemy optical and electro-optical devices were under development, as were lasers for strategic applications, such as theater missile defense. Opinions by the Judge Advocates General of the Navy and Army in 1984 concluded that injury to combatants ancillary to the use of lasers for rangefinding, target acquisition, or other materiel purposes was not prohibited by the law of war. The United States opposition to a laser protocol was based in part on a concern that any protocol would affect lawful uses, which could place civilian populations and individual civilians at greater risk from less-accurate delivery of conventional munitions while relinquishing or diminishing a lawful enhancement of tactical capabilities that enables United States forces to fight more effectively.

A 1988 opinion by The Judge Advocate General of the Army, with the concurrence of the offices of the Judge Advocate Generals of the Navy and Air Force, concluded that use of a laser as an antipersonnel weapon would not violate the law of war prohibition on *superfluous injury* or *unnecessary suffering* contained in article 23(e) of the Annex to Hague Convention IV Respecting the Laws and Customs of War on Land of 18 October 1907. This became and remains the position of the United States. It was feared that a blinding laser weapon protocol would establish an exception to long-standing law of war principles by prohibiting the lawful use of a lawful weapon or system against a combatant. Concern was expressed that any protocol would have an inhibiting effect on legitimate employment of lasers by battlefield commanders of States Parties, fearing that they or operators of laser systems could be charged with war crimes if captured. Spurious charges of war crimes was a basis for denial of prisoner of war status to U.S. military personnel entitled to such status when captured by North Vietnam during the Vietnam War. This precedent weighed heavily in development of the United States position. The United States also opposed a laser protocol because time devoted to its formulation would detract from the primary purpose for the Review Conference, which was the redrafting of Protocol II in order to address the more serious problem of the misuse of landmines in some parts of the world.[3]

At the same time, the United States had neither plans nor proposals for development of a blinding laser weapon. By the fourth and final session of the United Nations-hosted meetings of the Group of Governmental Experts in January 1995, efforts by Sweden and the ICRC to enlist political support for a laser protocol had proven to be moderately successful. Upon conclusion of that session, the decision was made to reconsider the United States position before the Review Conference convened in September 1995.

There were two major legal factors in this reconsideration process. Each will be discussed concurrently in the context of development of the revised United States position and as each was considered in the Review Conference.

As indicated, the United States did not and does not regard the use of a laser to blind or to cause other eye injury to an enemy combatant as constituting *unnecessary suffering* in violation of the law of war. States Parties involved in the negotiations agreed that lasers had become an important tool on the battlefield and that blinding ancillary to their use or use as other than antipersonnel weapons *per se* was inevitable and lawful. Even for the few States Parties (such as Sweden) that sought language to prohibit intentional laser blinding, it had proven impossible in the discussions of the Group of Governmental Experts to draft language that would prohibit intentional blinding while acknowledging the legality of ancillary blinding. The issue of addressing individual intent seemed insurmountable and was of major concern to a number of delegations that were the more active participants in the laser negotiations, including the United States, the United Kingdom, Australia, France, Canada, Argentina, Denmark, and Russia.

In recognition of this, there was a desire to shift the focus of the protocol from battlefield use to creation of a national-level obligation. This would provide the battlefield commander or laser device user the same right to assume the lawfulness of the laser devices as he or she has for other issued weapons or devices.[4] This would also entail a shift from a law of war approach to one more characteristic of arms control agreements.

The second factor entailed addressing Swedish concerns about use of a laser for systematic, intentional blinding. Traditionally the issue could have been resolved by prohibiting the use of lasers to permanently blind as a "method of warfare." The original Swedish proposal contained language prohibiting the use of "laser beams as an antipersonnel method of warfare."[5]

Method of warfare is one of two historic phrases in the law of war. Although neither phrase has an agreed definition, *means of warfare* traditionally has been understood to refer to the effect of weapons in their use against combatants, while *method of warfare* refers to the way weapons are used in a

3. Many of these points were expressed in a 1 February 1995 letter from President William J. Clinton to Senator Patrick J. Leahy.

4. The presumption of legality is reinforced by Department of Defense Directive 5000.1, which requires a law of war review of all weapons by the Judge Advocate General of the proponent department.

5. CCW/CONF.I/GE/CRP.3 (16 May 1994).

broader sense. Thus, *means* considers the legality of the way in which a projectile or its fragments, for example, kill or injure combatants. As an illustration, Protocol I of the UNCCW makes the use of fragments not detectable by X-ray a prohibited *means of warfare*.

In contrast, *method* weighs the way in which weapons may be employed, particularly where employment may have an adverse effect on civilians not taking a direct part in the hostilities. The prohibition of poison or poisoned weapons contained in article 23(a) of the Annex to Hague Convention IV of 1907 is a prohibition on a *means of warfare*, while the customary practice of condemning the poisoning of wells prohibits a *method of warfare*. Likewise, starvation of an enemy nation has been a *method of warfare;* destruction of crops and execution of a blockade are two *means* by which the *method* could be accomplished.[6] Had this historic distinction been maintained between *means of warfare* and *methods of warfare*, a provision along the lines noted above might have been possible in the laser protocol.

Unfortunately, a certain degree of confusion and overlap between the two concepts has occurred over the past two decades. In an effort to update the 1907 Hague Convention IV, the following language was written into article 35 of the 1977 Additional Protocol I: "In an armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited . . . . It is prohibited to employ weapons, projectiles, and material [sic] and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

The first paragraph merged the two phrases. The second used *methods of warfare* where *means of warfare* may have been more accurate. Its predecessor provision, article 23(e) of the Annex to the 1907 Hague IV, prohibited the employment of "arms, projectiles, or material [sic] of a nature to cause superfluous injury," that is, *means of warfare.*

The result of this confusion of terms precluded support by the United States for use of the phrase *method of warfare*. It was feared that use of the phrase *method of warfare* could lead to a prohibition on the lawful employment of laser devices (such as rangefinders, jammers, or target designators) or that ancillary blinding could result in war crimes allegations.

The United States was joined in its opposition to use of the phrase *method of warfare* by other delegations that were major participants in the drafting of Protocol IV, most notably the United Kingdom and France. In a meeting with nongovernment organizations on 6 October 1995 (during the first session of the Review Conference), Swedish delegate Marie Jacobsson stated that States Parties other than the United States had "real problems" with use of *method of warfare*, that is, that while the concern expressed by the United States may have been one of the more vocal, the United States did not necessarily hold the most extreme position on this issue.

On 29 August 1995 Secretary of Defense William J. Perry approved a new Department of Defense policy on blinding lasers. It stated:

> The [DoD] prohibits the use of lasers specifically designed to cause permanent blindness of unenhanced vision and supports negotiations prohibiting the use of such weapons. However, laser systems are absolutely vital to our modern military. Among other things, they are currently used for detection, targeting, range-finding, communications, and target destruction. They provide a critical technological edge to U.S. forces and allow our forces to fight, win, and survive on an increasingly lethal battlefield. In addition, lasers provide significant humanitarian benefits. They allow weapon systems to be increasingly discriminate, thereby reducing collateral damage to civilian lives and property. The [DoD] recognizes that accidental or incidental eye injuries may occur on the battlefield as the result of the use of legitimate laser systems. Therefore, we continue to strive, through training and doctrine, to minimize these injuries.

This policy statement and supplemental guidance contained in a memorandum signed the same day by Secretary Perry became the basis for the revised United States position, the negotiation guidance for the United States Delegation, and the statement delivered by Ambassador Michael J. Matheson in the Review Conference plenary session on 27 September 1995. The United States position in turn became a primary basis for drafting the text of Protocol IV on Blinding Laser Weapons.

The Review Conference was convened in Vienna on 24 September 1995. Ambassador Wolfgang Hoffmann of Germany was appointed as Chairman of Committee III, the Laser Working Group. Committee III met four times over the next two weeks in its preparation of Protocol IV.

This historical background is important to understanding the results of the Vienna negotiations of Protocol IV and its text.

3. **Protocol negotiation and analysis.** Protocol IV consists of the following articles:

a. Article 1. The text of Article 1 states:

6. Starvation of civilians or an enemy civilian population as a method of warfare is now prohibited by Article 54 of the 1977 Protocol I Additional to the Geneva Conventions of August 12, 1949. Although the United States is not a party to Additional Protocol I, United States policy and practice is consistent with the prohibition contained in Article 54.

> It is prohibited to employ laser weapons specifically designed as their sole combat function or as one of their combat functions to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. The High Contracting Parties shall not transfer such weapons to any State or non-State entity.

As the delegate from Sweden observed in the fourth and final meeting of the Laser Working Group on 6 October 1995, Protocol IV is a unique step in combining law of war and arms control mechanisms. The first sentence of Article 1 follows arms control lines by creating a national obligation to forego the use on the battlefield of a laser weapon of the type described in the balance of the sentence, rather than establishing that an antipersonnel laser weapon is inconsistent with the law of war prohibition on *unnecessary suffering.*

As Sweden stated in the first meeting (29 September 1995) of Committee III (the Laser Working Group), the intent of the protocol is clear: to prohibit battlefield use of antipersonnel laser weapons in order to prevent systematic, intentional blinding of combatants. It does not, and was not intended to, prohibit the use of laser systems for rangefinding, jamming, dazzling, communications, weapons guidance, or attack or destruction of materiel. The intent also was to restrict *battlefield* (i.e., tactical) lasers. The Protocol does not affect possible strategic or theater laser defense systems unless such a system meets the criteria for a blinding laser weapon contained in Article 1. Establishment of an obligation at the national level on design and deployment, rather than promulgation of a rule for battlefield employment, was intended to provide an assurance to military commanders that laser systems on the battlefield are lawful, while avoiding the more complex, difficult issues of mens rea and individual criminal responsibility.

Neither the prohibition in Article 1 nor anything else in Protocol IV establishes, nor was it intended to establish, that an individual, intentional act of blinding by a laser constitutes *unnecessary suffering* or is otherwise a violation of the law of war, for several reasons. The first reason was the unwillingness of most delegations, including the United States, to conclude that blinding by a laser is worse than blinding by other conventional weapons or other battlefield injuries (such as quadriplegia) or death. The second reason was a desire expressed by a number of delegations, including the United States, to avoid an offense based upon mens rea. For these reasons, guidance to the United States delegation contained in the 29 August 1995 supplemental memorandum of the Secretary of Defense was explicit in directing that "the protocol should not prohibit the intentional use of a laser designed for other purposes to cause permanent blindness."

Finally, although Article 2 requires use of a laser device in a manner consistent with the spirit and intent of the Protocol, the delegations could not agree that a soldier should be criminally responsible if, in an *in extremis* situation, he employs a laser device against an enemy combatant to save the user's life.[7] However, a laser meeting the Article 1 criteria for a blinding laser weapon is prohibited from any use, whether for individual or systematic, intentional blinding.

In accordance with the 29 August 1995 supplemental guidance of the Secretary of Defense, Article 1 does not prohibit research, development, manufacture, or possession of such a weapon (such as to test and to evaluate laser protection equipment, or possession of foreign laser equipment [including antipersonnel laser weapons whose battlefield use is prohibited by Article 1] for research, testing, and evaluation).

Employment of a laser is prohibited by the Protocol if, and only if, it meets each of four criteria:

(a) It is a weapon

(b) specifically designed

(c) to cause permanent blindness

(d) to unenhanced vision.[8]

Choice of the term *weapon* was intentional to distinguish the prohibited system from lasers which are used for rangefinding, jamming, dazzling, communications, weapons guidance, and similar purposes. The criteria of designing a weapon to cause intentional, permanent blindness (that is, injury to humans) distinguishes the intended prohibition from a laser specifically designed to attack or destroy materiel, such as a missile. Further definition of *laser weapon* was strongly resisted by a number of delegations for a number of reasons, including time constraints. While the many rangefinders, jammers, or antimateriel lasers may have more than sufficient power to cause permanent blindness to an individual, it is the intent of the program, generally stated in the operational requirement document, that determines whether or not the laser falls within Protocol IV's prohibition on battlefield use. Due to a duality in laser capabilities, no clearer distinction was possible.

7. A recent article by the delegate of the International Committee of the Red Cross who participated in the negotiations incorrectly declares that "[i]t goes without saying that the Protocol bans the deliberate blinding of both soldiers and civilians." Louise Doswald-Beck, *New Protocol on Blinding Laser Weapons*, INT'L REV. OF THE RED CROSS, May-June 1996, at 293. This statement is inconsistent with the frequently stated intent of the United States delegation and the other delegations that drafted the Protocol, which, as the ICRC delegate acknowledges, "was not contested by delegations." *Id*. at 292. For the reasons stated herein, the Protocol contains no language, and was intended to contain no language, banning the deliberate blinding of an enemy soldier or any other conduct that might raise individual mens rea. In contrast, Article 14(2) of the Amended Protocol II on landmines, booby traps, and other devices contains explicit language for the imposition of penal sanctions on individuals violating the provisions of that protocol, which was negotiated concurrently with Protocol IV.

8. As indicated, these criteria originated in the 29 August 1995 Secretary of Defense policy statement.

S*pecifically* was carefully chosen over *primarily* based upon the ordinary meaning of each term, even though (as noted in the preceding paragraph) the power of a laser may permit it to have dual potential. Virtually any laser may cause eye injury, including permanent blindness, under the right circumstances, and any laser with adequate power to jam, damage, or destroy (e.g., an electro-optical device) could have sufficient power to cause damage, including permanent blindness, to unenhanced vision. Conversely, a laser device that is eye safe at all ranges would likely lack the power to perform missions such as jamming or weapons guidance. The term p*rimarily* would have meant that the laser in question was designed *chiefly* to blind, thereby allowing a laser whose primary purpose (in quantitative terms, 50.1%) was to jam, but that had a secondary purpose (49.9%) of blinding. This would have undermined the purpose for, and the intent of, the protocol.

Specifically means "explicit," that is, an intended or stated purpose. While the duality of capability of many lasers may make this difficult to ascertain where the operational requirement document does not state it as one of a laser's capabilities, *specifically* was regarded as more objective than *primarily*. Individual States Parties are then under an obligation to ensure good-faith implementation of the Protocol.

The clause "as their sole combat function or as one of their combat functions" is redundant in view of the acceptance of *specifically.* However, some delegations felt it was both complementary and necessary, and it was retained in the final form of the protocol.

Permanent blindness will be discussed in the analysis of Article 4.

Unenhanced vision is directly related to the acknowledgment in Article 3 of the inevitability of some eye injury and its lawfulness as the result of laser use against electro-optical and optical equipment. As the first sentence of Article 1 states, *unenhanced vision* means "the naked eye or . . . the eye with corrective eyesight devices," such as glasses or contact lens. It does not mean binoculars, a telescopic sight, night-vision goggles, or similar devices used to increase visual capability above that required by an ordinary person to perform routine tasks, such as reading or driving an automobile.

The second sentence of Article 1 is the culmination of an original proposal by Austria, which received support from Belgium, Cuba, and Canada, to prohibit the development, production, stockpiling, or transfer (as well as use) of a laser whose use is prohibited by the Protocol. The United States,[9] India, and a number of other nations opposed limits on development, production, and stockpiling, expressing concerns as to verification or the drafting of an unnecessarily complex protocol in the limited time available. Consequently, the provision was limited to transfer.

The prohibition on transfer was cleared by the Departments of Defense and State and the Arms Control and Disarmament Agency in the course of the negotiations; however, further examination of the ban on transfer raises a potential problem that relates directly to the ability of a State Party to verify treaty compliance. The prohibition on transfer may limit or prevent United States agencies from obtaining and examining foreign laser devices suspected of meeting the criteria set forth in Article 1.

The intent of the drafters was to prevent the transfer of a laser weapon which meets the Article 1 criteria to a State or non-State entity, to prevent proliferation, and to minimize the risk of their illegal battlefield use. The transfer provision would not prohibit the United States from receiving a laser weapon, as the obligation is on the transferor rather than the transferee. It does not prevent: (1) the transfer of a laser device that is not established to be a laser weapon, (2) the receipt of a laser weapon from a non-State Party, (3) the recovery of a laser weapon from a battlefield, or (4) the examination of a laser weapon while in the hands of another State Party. Thus, if State Party A acquires a suspect laser, it may not permanently transfer that laser to State Party B if it determines that the laser is in fact a laser weapon prohibited by the Protocol. However, State A may allow State B to study, test, and examine the weapon within the territory of State A, or State A authorities may loan it to State B for the same purposes.

Summary. Since the first sentence of Article 1 explicitly follows the 29 August 1995 policy statement of the Secretary of Defense, it is consistent with the interests and policy of the United States. For reasons stated in this analysis, the prohibition on transfer may limit U.S. intelligence and verification efforts. It should not impede U.S. ratification and, indeed, would remain a problem whether the United States makes a favorable or unfavorable decision as to ratification.

b. Article 2. Article 2 states: "In the employment of laser systems, the High Contracting Parties shall take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision. Such precautions shall include training of their armed forces and other practical measures."

In meetings with members of the Swedish delegation, it was apparent that a concern remained that while Article 1 prohibits battlefield use of a specific antipersonnel weapon, nonetheless an unscrupulous State or members of its military forces could employ laser rangefinders or other devices to the end Sweden sought to prevent—systematic, intentional blinding.[10] At the same time, the Swedish delegation was aware of the concerns

9. The 29 August 1995 supplemental guidance of the Secretary of Defense expressly directed the U.S. Delegation to oppose any limits on development, production, or stockpiling. *Transfer* was not mentioned.

of the United States and other delegations with regard to a provision condemning laser blinding as a *method of warfare*. It also was aware that a number of delegations, including the United States, could not accept language that would make it a war crime to use a laser device to blind under any and all circumstances.

Article 2 is compromise language drafted by delegates of States Parties from Sweden, the Netherlands, the United Kingdom, France, and the United States[11] at the request of the Chairman of the Laser Working Group during its third meeting on 4 October 1995. Article 2 is intended to meet a concern of the Swedish delegation—that is, not to undo with the one hand what the other hand accomplished in Article 1. It does not make the use of a laser device to intentionally blind an enemy combatant a violation of the Protocol or the law of war, but admonishes States Parties to take "feasible precautions" in their employment of laser devices to prevent systematic use of laser devices for blinding and to minimize the risk of what would be tantamount to a violation of the spirit and intent of the Protocol.

The UNCCW defines *feasible precautions* in Article 1, paragraph 5 of Protocol III (Incendiary Weapons), stating that *feasible precautions* "are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." Although the United States elected not to become a party to Protocol III at the time of its ratification of the UNCCW, the Departments of State and Defense and the Joint Chiefs of Staff agreed with the definition of *feasible precautions* at the time of its incorporation into Protocol III (1980),[12] and no objection to the definition has been expressed in subsequent reviews.

The examples of precautions which are written into Article 2 (training and "other practical measures") are illustrative rather than exhaustive. The language parallels that contained in the 29 August 1995 policy statement by Secretary of Defense Perry. Other practical measures would include doctrine and rules of engagement. Although the Secretary of Defense used the term *doctrine* as an example in his 29 August 1995 policy statement, some States Parties were reluctant to use the term (even as an example) because their military forces do not rely on doctrine to the extent that United States forces do. Consequently, "other practical measures" was substituted.

Article 2 does not, and was not intended to, prohibit blinding by laser as a *method of warfare*. The smaller group of five that drafted Articles 1 through 3 at the request of the Chairman of the Working Group had as their intent avoidance of the term *method of warfare* for reasons stated previously.

A statement offered by Iran (not a State Party) in the last informal Laser Working Group meeting on 6 October 1995 that the Protocol should be interpreted as meaning that any intentional blinding is illegal was immediately challenged by the head of the United States delegation. In that same session, Mexico stated that the Protocol prohibits the use of lasers as a means or method of warfare, while Ecuador stated that the protocol prohibits blinding laser weapons as a means of warfare.

These statements are not supported by the negotiation history, and statements by the States Parties who drafted articles 1 through 3—Sweden, France, the Netherlands, the United Kingdom, and the United States—are to the contrary. Neither Iran, Mexico, nor Ecuador repeated its statement in the final formal session of the Laser Working Group that followed the informal working group meeting, or in the Conference's final plenary meeting.[13] In contrast, in the final, formal session of the Laser Working Group on 6 October 1995, the Netherlands and France—both participants in the smaller drafting group—offered statements that Protocol IV does not prohibit blinding by laser as a *method of warfare*. Their statements were not challenged.[14]

Summary. Article 2 was drafted in a way that would carry the spirit and intent of Article 1 over to the employment of laser

10. Although the terms *mass blinding* and *systematic, intentional blinding* were used in these meetings and in the very informal 4 October 1995 drafting session (discussed *infra*), the latter more accurately captures the intent of the drafters. This always was the intent, as confirmed in a paper by the ICRC delegate; *see* L. DOSWALD-BECK, BLINDING LASER WEAPONS, para. 2.4.2.1 (Human Rights Centre, University of Essex, 1995), which states that "[i]t was thought that this . . . would fulfill the need of preventing large numbers of persons [from being] intentionally blinded, which is what is feared and what repulses persons . . . ."

11. The special drafting group appointed by the Chairman of the Laser Working Group consisted of the representatives of Sweden, Marie Jacobsson; the Netherlands, Gert-Jan van Hegelsom; the United Kingdom, Henry Pugh and Lieutenant Colonel David Howell; France, Phillippe Sutter; and the United States, the author of this article. This group drafted Articles 1 through 3 and agreed to submit them to the Laser Working Group as an indivisible product. They were accepted as such by the Laser Working Group and the conference.

12. This statement is based on the personal knowledge of the author of this article, who was the member of the United States delegation responsible for negotiation of Protocol III.

13. Under the terms of Article 8, paragraphs 3(a) and (b) of the UNCCW, States not parties may participate in a review conference as observers; the same privilege is extended to the ICRC. But only States Parties to the UNCCW may vote for amendments to the UNCCW or its protocols, or for new protocols. This language was intended as an incentive for States to ratify or accede to the UNCCW and its protocols. The language was also intended to prevent a State which is not a party from offering proposals which would bind States Parties but by which the non-State Party would not be bound. Similarly, only statements by States Parties are germane to the negotiating history of the UNCCW and its protocols.

14. The article by the ICRC delegate (*see* Doswald-Beck, *supra* note 7) errs again on page 292 in stating that Article 2 means that "if lasers are used to counter optical equipment, particular efforts would have to be made to avoid blinding individuals, as in practice such lasers would be the most serious hazard to eyesight." As indicated in the discussion of unenhanced vision, the ICRC statement is not consistent with the drafting intent of the States-Parties.

devices other than weapons, without making it a war crime to use a laser to permanently blind an enemy combatant, and to avoid any confusion that may have resulted from the use of the term *method of warfare*. Its language is consistent with the 29 August 1995 supplemental guidance provided by the Secretary of Defense.

c. Article 3. Article 3 provides: "Blinding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by this Protocol."

The decade of debate over a laser protocol had led all participants to appreciate that the legitimate use of lasers for the various missions previously identified inevitably could, and in all likelihood would, result in some cases of loss of vision by combatants. It was essential to acknowledge this as inevitable and lawful. This was recognized in the guidance for the United States Delegation and by all States Parties in the Vienna negotiations and was not a subject of debate.

The clause "including laser systems used against optical equipment" was suggested by the ICRC in draft language it circulated in July 1995. It was incorporated into the United States guidance and was subsequently offered by Ambassador Matheson in his 27 September 1995 plenary statement. Similar language was contained in a working paper submitted to the Review Conference by the Netherlands on 29 September 1995, and the clause became a part of the Laser Working Group's draft in the course of its 2 October 1995 session. It was retained by the small five-delegation drafting group during the 4 October 1995 meeting mentioned in the review of Article 2.

The clause serves several purposes. First, it complements the prohibition in Article 1 against the use of a laser weapon specifically designed to permanently blind unenhanced vision. Battlefield optics are used to enhance vision to aid enemy employment of weapon systems, and, in many respects, they are critical to the most effective use of those systems. Second, the clause is an acknowledgment that a variety of optics may be in use on the battlefield and that some of these optics increase the risk of eye injury by amplifying the power of a laser beam that may be projected through the optic into the user's eye. For example, one United States soldier apparently suffered this type of injury to one eye during Operation Desert Storm.

Third, the broader term "optic" was preferred over "electro-optic" because a laser device used for jamming enemy optics cannot discriminate between non-direct view (electro-optical devices such as television, infrared, and night vision devices) and direct view (binoculars, sniper scopes, and some armored vehicle periscopes) optical systems. Guidance for the United States Delegation was specific in its preference for the broader category, stating in part that the delegation should "seek to clarify that 'unenhanced vision' means vision that is not enhanced with *optical devices (*e.g., night vision scopes, *binoculars, telescopes,* and video cameras) . . . ." [emphasis added]. This preference was strongly supported by other key delegations, such as the United Kingdom, France, Russia, and China, and it is unlikely that consensus on a laser protocol could have been achieved without the use of the broader term.[15]

Finally, the term *optic* was chosen with complete awareness that counter-optics laser use may result in permanent blinding. As a delegate from the Netherlands observed during a 3 October 1995 working group meeting, the prohibition sought in Protocol IV was against systematic, intentional blinding. A number of delegations were unwilling to accept any provision that might suggest that counter-optic blinding is an illegal act.

Two nongovernment organizations, the ICRC and Human Rights Watch, lobbied heavily but unsuccessfully between the third and fourth meetings of the Laser Working Group for the use of the narrower term *electro-optic* (contrary to the draft previously offered by the ICRC). Adoption of the narrower term would have resulted in an inconsistency in the Protocol. The States Parties were unwilling to prohibit the use of a laser to blind an individual soldier, that is, to make such use a war crime. For example, had Article 3 used the term *electro-optical* instead of the broader term *optical*, it would have implied that the incidental blinding of a soldier using a sniperscope would be illegal when his intentional blinding would not be. The narrower alternative was impractical, and the ambiguity that its use would have caused was undesirable. The special drafting group appointed by the Chairman of the Laser Working Group determined that the broader category was preferable. Ultimately, the Laser Working Group and the States Parties participating in the Review Conference agreed and adopted this language by consensus.

Summary. The language of Article 3 is consistent with the guidance for the United States Delegation, and it is essential to the future success of the laser protocol. It recognizes the inevitability of eye injury as the result of lawful battlefield laser use and is an important collateral step in avoiding war crimes allegations where injury occurs from legitimate uses.

d. Article 4. Article 4 states: "For the purpose of this Protocol 'permanent blindness' means irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery. Serious disability is equivalent to visual acuity of less than 20/200 Snellen measured in both eyes."

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15. The article by the ICRC delegate (*see* Doswald-Beck, *supra* note 7) errs once again on page 294 in asserting that "If lasers were used against direct optics, such as binoculars . . . [s]uch blindness could hardly be called 'incidental or collateral' as it would be deliberate and direct. It is submitted, therefore, that according to normal interpretation of Article 3 the phrase 'including laser systems used against optical equipment' could not be used to legitimize the deliberate blinding of persons using binoculars or other direct [sic] optics." Again, this statement repeats an argument against use of the term *optic* (as opposed to *electro-optic*) offered by the ICRC delegate during the session, but that was not accepted by the delegates who drafted this language. It is also counter to the logic of the delegations in using the words *unenhanced vision* in Articles 1 and 2.

Article 4 proved to be the most difficult and time-consuming provision to draft because there is no agreed international definition for permanent blinding which is suitable for use with reference to battlefield laser injury. Definitions which had been considered are for other purposes, such as percentage of disability, or with a view to establishing visual acuity for an individual suffering from progressive visual deterioration, such as cataracts. The new technology of battlefield laser injury has brought with it a need for a definition that approaches the issue from an entirely different angle than those related to deterioration from disease or percentage of disability.

Two opposing views were offered in pursuit of a definition. Some, including nongovernment organizations representing the blind or visually impaired, argued against a definition, in part because of their experience a decade earlier in seeking a global definition (and discovering there were at least thirty-two definitions, some significantly less scientific than others). As the Protocol was to establish compliance, however, the United States and some other States Parties felt that it was imperative to have a definition that was as precise as possible.

The first sentence of Article 4 is based upon the official definition for blindness of the United Kingdom. The second sentence and the visual acuity standard (as opposed to a percentage of loss of vision) was incorporated at the insistence of the United States to provide an objective standard to complement the British formula. The Article was adopted by consensus within the Laser Working Group with a realization that the issue merits further consideration by the scientific community. If a better definition results from future efforts, it may be offered as an amendment of Article 4 at a subsequent Review Conference.

Summary. Article 4 offers as precise a definition of permanent blindness as could be achieved under the circumstances. In all likelihood it can and will be improved upon at a future Review Conference. It is precise enough to prevent misuse or misunderstanding of the term.

e. Article 5. Article 5 covers entry into force of the Protocol, stating that "This Protocol shall enter into force as provided for in paragraphs 3 and 4 of article 5 of the Convention."

This paragraph provides that the Protocol will enter into force six months after the date by which twenty States have notified their consent to be bound by the Protocol (UNCCW article 5, paragraph 3); the Protocol will enter into force for States other than the first twenty six months after the date on which that State has notified its consent so to be bound (UNCCW article 5, paragraph 4).

Article 5 of Protocol IV adopts the mechanism by which the UNCCW and its first three protocols entered into force and the method by which subsequent States become bound by the Convention and its protocols. These mechanisms were accepted by the United States at the time of its ratification of the UNCCW and its Protocols I and II. No UNCCW Convention provisions were changed by the Review Conference.

Summary. There are no legal issues with respect to this provision.

f. Scope. The Protocol contains no provision regarding its scope of application. The treaty's scope of application (Article 1) extends to international armed conflicts only. At the time of the drafting and adoption of Protocol IV, participants were aware that a broadened scope for Protocol II (Landmines, Booby-traps, and Other Devices) was being considered to extend the scope of the latter to internal conflicts. There was agreement that the scope of Protocol IV would be deferred until that of Protocol II was resolved, and a general understanding existed among participants in the Review Conference that the scope of Protocol IV would be the same as for Protocol II. To this end, the Report of Committee III [Laser Working Group] stated: "[d]uring the course of negotiations on the draft text, the Committee decided to leave the question of scope . . . to the decision of the Drafting Committee of the Review Conference, pending the agreed text on scope negotiated in Main Committee II [Landmines Working Group]."[16]

This understanding was reflected in Resolution 2 adopted by the XXVIth International Conference of the Red Cross and Red Crescent held in Geneva in December 1995, which states that: "[w]ith regard to blinding and other weapons . . . [the ICRC] *welcomes* the general agreement achieved at the Review Conference that the scope of application of this Protocol should cover not only international armed conflicts." [emphasis in original].

In the opening plenary of the final Review Conference session on 22 April 1996, Conference President Johan Molander (Sweden) declared his intention not to reconvene Committee III (Laser Working Group), that is, not to re-open Protocol IV since it had been adopted by the Conference at its first session in Vienna. There was no objection to this announcement. This left it to the Conference to determine the scope of Protocol IV by other means.

The Review Conference amended Article 1 of Protocol II to extend its scope to include "situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949" for all parties to the conflict if the conflict is occurring in the territory of a State Party to the UNCCW and its amended Protocol II.

India was willing to extend the scope of Protocol II only. As a result, the scope of Protocol IV is limited to the scope of the UNCCW, that is, to international armed conflicts. However, in the statement of the Delegation of the United States in the final plenary session on 3 May 1996, Ambassador Michael J. Mathe-

16. CCW/CONF.I/4** (12 Oct. 1995), Report of Main Committee III.

son declared (in a position cleared by the Departments of State, Defense, and Justice) that: "[T]he United States supported the expansion of the scope of Protocol IV, and it is the policy of the United States to refrain from the use of laser weapons prohibited by Protocol IV at all times."

Therefore, while the scope of Protocol IV technically is limited to international armed conflicts, the United States, as a matter of policy, will apply Protocol IV to all armed conflicts (however they may be characterized) and peacetime use, including domestic federal law enforcement activities.

4. **Conclusions**. As drafted and adopted by the Review Conference, Protocol IV is consistent with the policy and guidance provided by the Secretary of Defense on 29 August 1995. It is also consistent with the international law obligations of the United States, including the law of war.

5. This memorandum was coordinated with Ambassador Michael J. Matheson; the Office of the Legal Adviser, Department of State; Office of the General Counsel, Department of Defense; Legal Counsel to the Chairman, Joint Chiefs of Staff; the Offices of Army and Navy General Counsel; and the Offices of The Judge Advocates General of the Navy and Air Force.

In addition to Ambassador Matheson's confirmation of the memorandum's factual recount of these negotiations, this memorandum was reviewed for factual accuracy by four other members of the United States delegation who participated in development of the Secretary of Defense's laser policy and delegation guidance and/or were present for the negotiation of Protocol IV: Dr. Ping Lee, Office of the Under Secretary of Defense for Acquisition & Technology (Arms Control Implementation & Compliance); Dr. Bruce E. Stuck, United States Army Medical Research Detachment, Walter Reed Army Institute of Research; Robert M. Sherman, Director, Advanced Projects Office, Arms Control and Disarmament Agency; and Captain William E. Christman, USN, Deputy Director for International Negotiations, Joint Staff (J-5) and by a principal member of the delegation of the United Kingdom, each of whom concurs with its factual account of the events recorded herein.

W. Hays Parks
Special Assistant for
Law of War Matters

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

Family Law Note

Military Retirement Pay—Property or Income?

The Uniformed Services Former Spouses' Protection Act (USFSPA) allows state courts to treat military disposable retired pay as marital property.[1] It also allows state courts to award military disposable retired pay for family support purposes, specifically alimony or child support.[2] The purposes are not, however, mutually exclusive. Two recent state divorce cases illustrate that military pensions can be classified as both property and income.[3]

In both cases, the divorce courts awarded the former spouses percentages of the military retirement pay as marital property.[4] In addition to the property settlement, the court entered child support orders using local child support guidelines. In assessing the child support awards, the courts considered as income the military retirement pay received by the retirees. The military retirees appealed, claiming that once the courts have classified the military pensions as marital property they could not also be treated as income for purposes of establishing child support.

Both appellate courts refused to accept this view of pension classification. Turning to their state support statutes, they found that the statutes broadly defined "income" to include money from *all* sources (except public assistance and child support) whether taxable or not.[5] The Wisconsin court found that the property divisions address rights between the spouses whereas child support orders address the child's right to a fair share of support from the noncustodial parent's income.[6] The Illinois court analogized retirement benefits to accounts receivable in business interests when couples divorce. The court found that, like accounts receivable, each spouse has an interest in the retirement pay as property of the marriage and then when the monthly amount is received it is income to the recipients for purposes of establishing their support obligation.[7]

Nothing in the USFSPA requires a state court to classify military retirement pay as either property or income. Indeed, the USFSPA merely allows the states to treat military retirement pay as they do civilian pension plans.[8] Thus, military retirement pay is both marital property subject to division between the spouses in a property settlement *and* income to the noncustodial recipient for determining any support obligation. Major Fenton.

Consumer Law Note

What's in a Name?

The United States Court of Appeals for the Third Circuit (Third Circuit) recently used a case of confused names between a father and son to clarify the requirements for a prima facie case under accuracy provisions of the Fair Credit Reporting Act (FCRA).[9] In *Philbin v. Trans Union Corp. and TRW Credentials*,[10] the Third Circuit held, among other things, that the mere existence of inaccurate adverse information in a credit report was sufficient evidence for a reasonable jury to find that the

1. 10 U.S.C.A. § 1408 (West 1996).

2. *Id.*

3. *See In re* Klomps, No. 5-96-0351, 1997 WL 49650 (Ill. App. 5 Dist. Feb. 7, 1997); Cook v. Cook, No. 95-1963, 1997 WL 120088 (Wis. Sup. Ct. Mar. 19, 1997).

4. In *Klomps*, the court awarded Mrs. Klomps 35% of disposable retired pay after 18 years of marriage. In *Cook*, the court awarded Mrs. Cook 50% of disposable retired pay after 12 years of marriage.

5. *Klomps*, 1997 WL 49650, at *2; *Cook*, 1997 WL 120088, at *4.

6. *Cook*, 1997 WL 120088, at *5.

7. *Klomps*, 1997 WL 49650, at *4.

8. *Cook*, 1997 WL 120088, at *4.

9. 15 U.S.C.A. § 1681-1681t (West 1996).

adverse information caused the denial of credit, at least where other accurate credit reports issued by that credit reporting agency (CRA) and other agencies did not contain any other adverse information.[11]

Some time prior to April 1990, TRW and Trans Union had both produced inaccurate credit reports regarding James R. Philbin, Jr. The reports listed a tax lien of approximately $9500 on his account.[12] This information was inaccurate and apparently resulted from confusing Mr. Philbin with his father, James R. Philbin, Sr. In the spring of 1990, the junior Philbin notified both CRAs that the information was inaccurate and demanded that it be corrected.[13]

Between the summer of 1990 and the start of the suit in April 1993, Mr. Philbin was denied credit by eight different credit providers.[14] Although the credit reports supplied by Trans Union and TRW listed the erroneous tax lien, the credit providers based their credit denial on a variety of reasons—none of which mentioned the tax lien.[15] At trial, the district court granted summary judgment for the CRAs, at least in part, because Mr. Philbin stipulated that none of the denials of credit ever mentioned the tax lien.[16] Consequently, the district court found that Mr. Philbin failed to meet his burden of going forward because he did not meet one of the elements of the prima facie case; he could not show that the denials of credit were based on the inaccurate tax lien information in his report.[17]

The FCRA provides that "whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[18] The FCRA allows for private causes of action for willful or negligent noncompliance with the requirements of the Act. To sustain an action under the accuracy provision, a plaintiff must meet the following four elements: (1) inaccurate information was included in a consumer's credit report; (2) the inaccuracy was due to the defendant's failure to follow reasonable procedures to assure maximum possible accuracy; (3) the consumer suffered injury; and (4) the consumer's injury was caused by the inclusion of the inaccurate entry."[19] *Philbin* focused on the last element, the issue of causation.

The Third Circuit agreed with the district court that the plaintiff had the burden of showing causation.[20] It disagreed, however, "that Philbin has failed to produce sufficient facts from which a reasonable jury could find that defendants' alleged negligence caused his injuries."[21] The error that the district court made was in "assuming that Philbin could satisfy his burden only by introducing direct evidence that consideration of the inaccurate entry was crucial to the decision to deny credit."[22] While the Third Circuit agreed that this might improve the plaintiff's case, all that is required is "that, as with most other tort actions, a FCRA plaintiff produce evidence from which a reasonable trier of fact could infer that the inaccurate entry was a '*substantial factor*' that brought about the denial of credit."[23] The Third Circuit found that, since Mr. Philbin had never been delinquent on any credit obligation and had not been denied credit prior to the credit providers receiving the inaccurate reports containing the tax lien information, a reasonable jury could infer that the denial of credit was based on the accurate tax lien entry.[24] The case is significant because it expressly rejects the notion that the plaintiff must prove the inaccurate information was the sole cause of the denial of credit.[25] It also demonstrates the fairly slight amount of evidence necessary to get the case to the jury.

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10. 101 F.3d 957 (3d Cir. 1996).

11. *Id.* at 968-69.

12. *Id.* at 960.

13. *Id.* at 960-61.

14. *Id.* at 960-62.

15. *Id.* at 960-61.

16. *Id.* at 962.

17. *Id.*

18. 15 U.S.C.A. § 1681e(b) (West 1996). The Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) has modified portions of the FCRA; however, section 1681e(b) is unaffected by these changes.

19. *Philbin*, 101 F.3d at 963.

20. *Id.* at 966.

21. *Id.* at 966-67.

22. *Id.* at 968.

23. *Id.*

For legal assistance practitioners, *Philbin* provides additional leverage when trying to make credit reporting agencies more responsive in correcting inaccuracies. This case makes it easier for consumers to use the potential "hammer" of the FCRA, the civil suit. Legal assistance practitioners should consider *Philbin* in determining whether to advise the client to seek outside counsel for a suit based on inaccurate credit report information. Ensuring the accuracy of a credit report can be an exasperating experience. Proper use by legal assistance attorneys of consumer-friendly cases like *Philbin*, along with legislative changes to the FCRA that will take effect in September of this year,[26] should help to alleviate some of this frustration for legal assistance clients. Major Lescault.

Tax Law Notes

Approved Private Deliverers

Passed in 1996, the Taxpayer Bill of Rights 2[27] permits taxpayers to use private delivery services to send returns and other information to the IRS and qualify for the timely-mailed-is-timely-filed rule.[28] This legislation required the Internal Revenue Service (IRS) to designate which private delivery services taxpayers could use.[29] Effective 11 April 1997, the IRS designated the following private delivery services and the following specific types of delivery services:

> 1. Airborne Express (Airborne): Overnight Air Express Service, Next Afternoon Service, and Second Day Service.
>
> 2. DHL Worldwide Express (DHL): DHL "Same Day" Service and DHL USA Overnight;
>
> 3. Federal Express (FedEx): FedEx Priority Overnight, FedEx Standard Overnight, and FedEx 2Day; and
>
> 4. United Parcel Service (UPS): UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air, and UPS 2nd Day Air A.M.[30]

As a result, taxpayers may use these private delivery services and qualify for the timely-mailed-is-timely-filed rule. The timely-mailed-is-timely-filed rule states that if an item is mailed prior to its due date it will be treated as if the IRS received it on the due date, even though the IRS does not actually receive the item until after the due date.[31] For example, a taxpayer who mails his tax return on 15 April will be treated as having timely filed that return on 15 April even though the IRS does not receive that return until 18 April. Prior to the Taxpayer Bill of Rights 2, a taxpayer could only receive this treatment if he sent the item through the United States Postal Service.[32] The Taxpayer Bill of Rights 2 changed this and allows private delivery services to qualify, so long as the private delivery services are designated by the IRS. Although the IRS did not designate the private delivery services until 11 April, taxpayers who have later due dates because they are overseas or have an approved extension will be able to use these services should they so desire. Major Henderson.

Docket Entry is a Court Decree

The Tax Court has ruled that a docket entry was a court decree for purposes of determining whether certain payments qualified as alimony.[33] In *Landreth v. Commissioner*,[34] Mrs. Landreth did not include $21,600 in payments that she received from her estranged husband. Mr. Landreth made these payments pursuant to Mrs. Landreth's motion for temporary maintenance. At the hearing on Mrs. Landreth's motion, the presiding judge made an entry on the docket sheet indicating that Mrs. Landreth's motion was "sustained." At issue in the case was whether or not the entry on the docket sheet was sufficient to constitute a decree. For a payment from one spouse to another spouse to qualify as alimony, it must be made pursu-

24. *Id.*

25. *Id.* at 969.

26. These changes will be detailed in an *Army Lawyer* note this summer.

27. Pub. L. No. 104-168, 110 Stat. 1452 (codified as amended in scattered sections of 26 U.S.C.).

28. *Id.* § 1210.

29. *Id.*

30. IRS Notice 97-26, 1997-17 I.R.B. 6.

31. I.R.C. § 7502 (RIA 1996).

32. *Id.* § 7502(b).

33. Landreth v. Commissioner, 73 T.C.M. (CCH) 2536 (1997).

34. *Id.*

ant to a divorce or separation instrument.[35] A divorce or separation instrument includes "a decree of divorce or separate maintenance or a written instrument incident to such a decree."[36] Mrs. Landreth unsuccessfully argued that the docket entry was not a decree. The Tax Court disagreed and held that under Missouri law the docket entry was a court decree.

This case illustrates once again that payments from one spouse to another will only be treated as alimony if all the statutory requirements are met. The payments must be made pursuant to a divorce or separation instrument.[37] Divorce or separation instruments include decrees of divorce (or separate maintenance) and written separation agreements. The payments must also end at the death of the payee spouse.[38] In addition, if the parties are separated but not divorced, the payments cannot be made to a member of the same household.[39] Legal assistance attorneys should keep these requirements in mind when drafting separation agreements and when advising clients on how to treat these types of payments on their tax returns. Major Henderson.

35. I.R.C. § 71(b)(1)(A) (RIA 1996).

36. *Id.* § 71(b)(2)(A).

37. *Id.* § 71(b)(1)(A).

38. *Id.* § 71(b)(1)(D).

39. *Id.* § 71(b)(1)(C).

Litigation Division Notes

The Civilian Personnel Branch of Litigation Division provides the following notes. For further information you may call DSN 426-1600.

Army Air Traffic Controller Age Discrimination Litigation

On 9 December 1981, President Ronald Reagan, by memorandum to the Director of the Office of Personnel Management (OPM), imposed an indefinite ban on employment by the Federal Aviation Administration (FAA) of striking members of the Professional Air Traffic Controllers Organization (PATCO) because the strike was not authorized by law. For a period of twelve years, those PATCO members were ineligible for employment with the FAA, to include federal employment at Army airfields.

On 12 August 1993, by memorandum to the OPM, President Clinton repealed the ban on reemployment of air traffic controllers (ATCs) terminated as a result of their strike against the federal government in August 1981. On 4 October 1993, as a result of President Clinton's repeal of the ban, the OPM issued Federal Personnel Manual (FPM) Bulletin 731-10 which mandated that all individuals terminated by the strike may be considered for employment in FAA ATC Specialist positions and in other positions in the federal government. Federal Personnel Manual Bulletin 731-10 urged these former ATCs to seek employment with those federal departments and agencies from which they were banned and urged that the ATCs directly contact the federal facilities where they would like to be considered for employment.

Installation civilian personnel officers (CPOs) and ATC selecting officials have received numerous applications for installation ATC positions at Army airfields from individuals terminated during the 1981 PATCO ban. Invariably, these individuals exceed the maximum entry age of thirty for original appointment as a DOD ATC, as required by the DOD.[1] However, the maximum entry age applies only to *original* appointments. Consequently, it does not apply to those former PATCO members who received their original appointment before they were terminated due to the ban. Because of the confusion over age requirements, PATCO applicants may be incorrectly considered as "too old" for ATC vacancies. Ensuring that CPOs and selecting officials understand that the maximum entry age requirement applies only to *original* appointments should help to avoid any unnecessary age discrimination litigation surrounding the denial of ATC positions. Major Fair.

Observations About Settlement Agreements

Most tribunals, including the Supreme Court, encourage negotiated settlement during the administrative processing of a complaint.[2] Settlements can be a winning situation for both sides. However, there is nothing worse than later discovering a potential defect in the agreement which may void it entirely, or worse, actually give the other side an advantage in future litigation. Four recent Army civilian personnel district court cases involved claims which were the subject of settlement agreements. Plaintiffs argued that the agreements were void or simply do not concern the causes of action raised in their court actions. Below are some tips to ensure that the agreement you enter into today will stand up in federal court years later.

One source of problems is the rush to produce a written product. In one pending case, a facially correct and binding settlement agreement suffered from a number of deficiencies. It was not sufficiently edited for punctuation or content (for example, the word "settlement" was misspelled). Furthermore, the agreement concerns only Title VII issues, but contained an incomplete discussion and waiver of rights under the Age Discrimination and Employment Act.[3] Most damaging was that the agreement did not adequately state what consideration management was to receive as part of the settlement agreement. While everything that the plaintiff was to receive was clear, the only benefit for management was that an unspecified formal EEO complaint which had been filed on a given date was settled.[4] There was no other discussion within the agreement itself of what the EEO complaint concerned.[5] A review of all records at the EEO office revealed that the plaintiff did not file a formal EEO complaint on the date specified in the agreement and that the relevant formal complaint was dated some weeks earlier. It

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1. *See* Memorandum, Assistant Secretary of Defense, subject: Maximum Entry Age for Department of Defense Air Traffic Controllers (May 9, 1995) (retaining the maximum entry age of 30 as provided by Public Law 96-347). However, the DOD memorandum allows component heads to waive the maximum entry age with respect to those individuals meeting the following criteria: (1) received ATC specialist certification according to FAA standards; (2) been qualified and facility certified in a DOD or FAA ATC facility; and, (3) engaged in the direct separation and control or management of air traffic at any ATC facility controlling traffic within United States airspace, or in such facilities operated by the DOD or the FAA outside the United States within one year prior to the date of appointment.

2. Brown v. General Serv. Admin., 425 U.S. 820, 828-31 (1976).

3. The waiver of ADEA claims did not comply with the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(f) (1996), which has specific requirements that must be met before an ADEA claim can be waived.

appears that in the rush to produce an agreement, an older agreement may have been pulled off a computer screen to serve as the template in which new information was added while portions of the original were deleted. This procedure was apparently performed without careful review and thoughtful consideration as to whether the old agreement contained all the necessary terms. In this rush, the wrong date was entered into the agreement and no other mention was made as to which claims the plaintiff was waiving. To avoid such problems, labor counselors must carefully review settlement agreements. Have someone else review the agreement and seek advice from more senior members of the office or attorneys in your technical chain.

In another case, no written manifestation of the agreement was ever produced. It is common practice for settlement agreements made during Merit Systems Protection Board (MSPB) hearings to simply be "read into the record," but not all MSPB hearings are transcribed. Thus, if the matter is brought into federal court, one must go through the time-consuming process of requesting the hearing tapes from the MSPB and searching them to find the settlement discussions. Additionally, tapes tend to get lost or suffer from sound deficiencies and other problems. Labor counselors may want to consider preparing a written settlement agreement which can be signed by all parties. Copies can be added to the record and maintained by the labor counselor and other appropriate offices.

The Civilian Personnel Branch recently had a case in which the plaintiff argued that he was on medication and suffering from severe sleep deprivation at the time of the settlement. Consequently, he claimed that he was "confused" and "not thinking straight" when he entered into the negotiated settlement agreement.[6] In this case, all of the individuals who signed the agreement for management, including the labor counselor, were named as alleged discriminating officials in other causes of action. Because of this apparent conflict, the court was not persuaded by their statements that the plaintiff appeared fine at the time that he entered into the agreement. However, the district court upheld the agreement because the plaintiff was represented by an attorney who also signed the agreement. If the plaintiff had not been represented by counsel, the court may have decided differently. Given the possibility that the labor counselor and other management officials may later be labeled as interested parties, or even as alleged discriminatory officials, management might consider having a completely neutral and detached witness present at the signing of the agreement for the sole purpose of later testifying as to the plaintiff's capacity. Such a witness could be anyone not involved with labor matters (e.g., the NCOIC of the criminal law section, the chief of legal assistance, or the claims office secretary).

Finally, agreements must be honored. Prior to entering into an agreement to give the complainant the "next available GS-5," consult everyone responsible for these positions (supervisors as well as funding appropriators) to verify when the next available position will occur. Make sure all terms of the agreement are well thought out and defined. For instance, if a position becomes open, but there is no money to fill it, is it available? Additionally, explore all contingencies. If no positions become available for a year or two, has management complied with the terms, or has there been a breach?[7] Has there been actual accord and satisfaction?[8] Failing to comply with an agreement is significant, but there are worse aspects. Should the matter end up in Court, it can impact on the credibility of the government's overall position and invite an adverse decision as to the causes of action.

The Litigation Division's Civilian Personnel Branch's mission is to defend management's decisions. It is easier to defend complaints that are the subject of well thought out and properly prepared settlement agreements. Labor counselors should carefully consider the above comments and seek advice and guidance on how best to ensure that a contemplated settlement agreement is written clearly and concisely enough to dispose of any potential future claims. Major Ray.

A Note of Caution About E-Mail

One author predicts that as computer records become increasingly important to everyday business, electronic mail (e-mail) will become the "darling of discovery."[9] Plaintiffs' attor-

4. The EEO claim can be identified in a number of ways. For instance, by stating exactly what it concerns (i.e., a performance evaluation, given by Joe Boss, for the period 1991-1992, while complainant served as a GS-5) or by referencing case numbers (the local EEO number, the MSPB number, and/or the EEOC number). In addition, labor counselors are encouraged to negotiate as comprehensive a waiver as possible. For instance, instead of just obtaining a waiver of a particular formal EEO complaint, seek to obtain a waiver of the complainant's right to bring a further complaint or suit on any claim that was or could have been raised up to the date of the settlement agreement.

5. Settlement agreements take on the attributes of a contract. United States v. ITT Continental Baking Co., 420 U.S. 223, 235-38 (1975). Courts may or may not allow oral or written evidence to vary or contradict the terms of the agreement depending on the Court's interpretation of the contract and the parole evidence rule.

6. Employees may waive their claims only when they have a full understanding of their rights and they voluntarily enter into the agreement. Alexander v. Gardner-Denver Co., 415 U.S. 35, 52 (1974).

7. Clearly define the procedures and remedies available to the complainant should he or she believe that a breach has occurred.

8. It is performance of the conditions of the accord which extinguish the underlying obligation. Geisco, Inc. v. Honeywell, Inc., 682 F.2d 54, 57-58 (2d Cir. 1982); Bowater N. Am. Corp. v. Murray Mach., Inc., 773 F.2d 71 (6th Cir. 1985).

9. John J. Dunbar, *When Documents Are Electronic: Discovery of Computer-Generated Materials*, WASH. STATE B. NEWS, Apr. 1997, at 33.

neys are quickly realizing the potential value in the discovery of all types of electronic information.[10] E-mail messages, for example, often contain a surprising degree of candor. Unlike a formal memorandum memorializing an action, an e-mail message may reveal the writer's full knowledge and intent on an issue.[11] Prior drafts of a memorandum and e-mail may also be used to fill in the gaps when memories of discussions about an action are vague or when paper documents were destroyed over time.[12]

With the advent of office automation, labor counselors and other legal advisors should use every available opportunity to issue words of caution about the use of electronic information. Managers and employees must be advised that e-mail systems are not private forums in which to engage in confidential communications. Except for relevance, undue burden, or privilege, e-mail messages and other electronic information are fully discoverable as "documents" under the definition provided in Federal Rule of Civil Procedure 34.[13] Additionally, in many jurisdictions Federal Rule 26(a) also requires the voluntary disclosure of "data compilations" as part of the "initial disclosure" required of parties in litigation. Managers and employees should also be advised that it is not all that difficult to find deleted "skeletons in the closet;" in other words, "deleted" does not always mean "destroyed." For example, deleted e-mail is often found on backup tapes of file servers, and deleted word processing files are easily recovered from the computer hard drive if not yet written over.[14] Your local Information Management Office (IMO) is an invaluable source for further education on these issues.

A final piece of advice concerns what to do if an EEO complainant, MSPB appellant, or plaintiff in civil litigation puts you on notice that he intends to seek computer discovery. You must take immediate steps to ensure that the electronic information is preserved by seeking the advice and assistance of the local IMO. Not only will the IMO know how to preserve the information, but it should also be able to help you "think big" or to realize the full extent of electronic information potentially available for discovery. For example, when you have a hard drive copied for preservation, ensure that all deleted and fragmented electronic data on the drive are copied as well as active files. If e-mail is routinely backed up to tapes, ensure that the system administrator preserves those tapes and does not copy over them in future backups.

As use of computer discovery continues to increase, the fairly scarce case law in this field will continue to develop and to clarify the issues. In the meanwhile, you should educate your "clients" about their use of electronic information and be prepared to preserve electronic information at first notice of intent to discover.[15] Captain Williams.

Supreme Court Rules Former Employees Are Covered Under Title VII

Recently, the United States Supreme Court resolved a conflict between the circuit courts and recognized the right of former employees to file suit under Title VII of the Civil Rights Act for postemployment retaliation. *Robinson v. Shell Oil Co.*,[16] unanimously reversed a decision by the United States Court of Appeals for the Fourth Circuit.[17] Robinson had initially filed an action for discriminatory discharge. While his

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10. One computer expert estimates that 20-30% of all information, including e-mail, is never printed in hard copy and that this percentage is increasing. Joan E. Feldman, *Evidence with a Bite: Computerized Files in Civil Litigation*, COMPUTER FORENSICS (1996).

11. Dunbar, *supra* note 9.

12. By way of example, one author reports a litigation moment every lawyer dreams of:

> The expert told us that his draft report had been discarded. We knew that the electronic version of his current report had been prepared by writing over the draft in the word processing program without saving the prior version. Unfortunately for him, he was unaware that computers do not literally write over the prior draft as long as there is disk space, they simply assign the prior version's space as available for rewriting and invisible to the program. Utility programs like Norton Utilities easily recover the "deleted" documents. We did. The draft was devastating to the expert's current opinion. The case settled one week later.

Attorneys Sift Electronically Stored Information for Gold, FED. DISCOVERY NEWS, Jan. 1997, at 1.

13. This rule provides the following:

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phone records, and other data compilations from which information can be obtained [and] translated, if necessary, by the respondent through detection devices into reasonably usable form) . . . .

FED. R. CIV. P. 34(a). The 1979 Amendments to the Advisory Committee Notes state: "The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronics (sic) data compilations . . . ."

14. MICHAEL J. PATRICK, AN ATTORNEY'S GUIDE TO PROTECTING, DISCOVERING, AND PRODUCING ELECTRONIC INFORMATION 4:10 (1995).

15. At least three types of sanctions have been employed by the courts for failure of a party to fully preserve and comply with a request for computer discovery: default judgment, monetary sanctions, and adverse inferences drawn at summary judgment or trial. Dunbar, *supra* note 9, at 39.

charge was pending, Robinson applied for a position with another company. He alleged that Shell Oil gave a negative employment reference in retaliation for his protected activity. The Supreme Court held that including former employees within the protection of Title VII for the purpose of retaliatory conduct was necessary to give full effect to the law's antiretaliation provisions.

Former employees who have engaged in protected activities could allege that postemployment actions, such as negative references, are retaliation. When negotiating settlement agreements, particularly ones that include provisions for the employee to leave federal service, labor counselors should consider establishing formal reference procedures. The settlement agreement could address the type of recommendation that would be given to other employers and could also direct the employee to list a particular person as a reference. It is essential that former supervisors are made explicitly aware of the terms of any settlement agreement to avoid inadvertent violations.

While *Robinson* held that former employees could assert the protections of Title VII, the Supreme Court did not address the merits of the alleged negative recommendation.[18] While negative recommendations may be the most obvious allegation of reprisal, other actions also may be viewed as stating a cause of action. For example, improper release of information to third parties, failing to provide employee records or information, refusal to hire family members, and a host of other perceived wrongs. Labor counselors should continue to stress compliance with established regulations and office practices and encourage supervisors to seek guidance if they believe a former employee is trying to "set up" the agency. Major Hokenson.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *the Environmental Law Division Bulletin (Bulletin)*, which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically in the Environmental files area of the Legal Automated Army-wide Systems (LAAWS) Bulletin Board Service (BBS). The latest issue, volume 4, number 7, is reproduced below. The *Bulletin* is also available on the Environmental Law Division Home Page (http://160.147.194.12/eld/eldlink2.htm) for download as a text file or in Adobe Acrobat format.

Final Military Munitions Rule: An Overview

On 12 February 1997, the Environmental Protection Agency (EPA) published the Military Munitions Rule,[19] which identifies when conventional and chemical military munitions become hazardous waste under the Resource Conservation and Recovery Act (RCRA). Military organizations that manage munitions must be prepared to implement this rule on 12 August 1997, the effective date.

The 1992 Federal Facility Compliance Act (FFCA) amended the Resource Conservation and Recovery Act (RCRA) by requiring the EPA to publish regulations that identify when munitions become a hazardous waste subject to the RCRA. In developing its rule over the past four years, the EPA reviewed comments from numerous organizations and individuals, including the Department of Defense (DOD), other federal agencies, states, tribes, universities, corporations, and citizens' groups.

The Military Munitions Rule will primarily affect the DOD, including the National Guard. Other federal agencies, such as the Department of Energy and the United States Coast Guard, which deal with military munitions on behalf of the DOD, will also be affected, as will government contractors who produce or use military munitions for the DOD. Some parts of the rule, however, apply to both military and nonmilitary activities. For example, the emergency response provisions, the new storage standards under subpart EE, and the limited exemption from manifest and marking requirements, apply to military and nonmilitary alike.

The rule acknowledges that the DOD has long-established and extensive storage and transportation standards that ensure explosive safety and security, while at the same time protecting human health and the environment. In drafting its rule, the EPA acknowledged that these DOD standards, developed and overseen by the Department of Defense Explosives Safety Board (DDESB), are at least as stringent as the RCRA standards. The EPA also relied on the military's excellent safety record in its management of munitions and explosives, regardless of their status as a product or waste.

16. 117 S.Ct. 843 (1997).

17. Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995).

18. *Robinson*, 117 S. Ct. at 843.

19. 62 Fed. Reg. 6621.

State Authority

The EPA has adopted the traditional RCRA approach to state authority and allows states to adopt requirements for military munitions that are more stringent or broader in scope than the federal requirements. At the same time, the EPA strongly encourages states to adopt the provisions of this new rule. It remains to be seen just how states will seek to manage waste military munitions. Nonetheless, in preparation for implementing the rule in August 1997, the DOD has drafted an interim implementation policy and distributed it to the field.

In the coming months, the DOD will be working closely with installations, major commands, and regulators to identify issues and to seek consensus on a final implementation policy. To assist states in understanding its munitions management practices, the DOD has been engaged in a partnering effort with state, tribal, and environmental group representatives. This initiative will continue in an effort to persuade regulators to adopt the EPA rule and the DOD's plan for implementing the rule.

The DOD's Regional Environmental Coordinators (REC) will support the partnering process by briefing regulators and facilitating discussions. The Regional Environmental Coordinators will also work closely with state regulators to assist in modifying state laws and regulations as may be necessary to adopt the EPA rule. Whether or not some states develop more stringent standards, the EPA rule has provided a blueprint and significantly clarified the military waste munitions management requirements.

When Are Munitions a Waste?

The Rule addresses a fundamental question—when do unused military munitions become a waste and thereby subject to the requirements of the RCRA? The rule identifies four circumstances under which unused munitions become waste:

(1) when abandoned by being disposed of, burned, detonated, incinerated, or treated prior to disposal;

(2) when removed from storage for the purpose of being disposed of, burned, incinerated, or treated prior to disposal;

(3) when deteriorated or damaged (for example, leaking or cracked) to the point that it cannot be put into serviceable condition and cannot reasonably be recycled or used for other purposes; or

(4) when declared a waste by an authorized military official (for example, the determination made by the Army concerning the M-55 rocket in 1984).[20]

In the case of "used or fired" munitions, the EPA followed their long-standing position that deposit of a product on the ground incident to its normal and expected use does not trigger the RCRA and indicated that some munitions can be expected to malfunction and not to explode on impact. In such circumstances, the EPA has defined as solid waste those unexploded ordnance that are:

(1) transported off range or from the site of use for the purposes of storage, reclamation, treatment, disposal, or treatment prior to disposal;

(2) recovered, collected, and then disposed of by burial or landfilling, either on or off a range; or

(3) fired and land off range and are not promptly rendered safe and/or retrieved.

The rule also identifies specific circumstances under which military munitions are not waste. Notably, military munitions are not waste when used for their intended purposes, such as:

(1) munitions used in training military personnel or emergency response personnel, including training in the destruction of unused propellant;

(2) munitions used in research, development, testing, and evaluation activities;

(3) munitions destroyed during range clearance activities on active and inactive ranges; and

(4) unused munitions that are repaired, reused, recycled, reclaimed, disassembled, reconfigured, or otherwise subject to materials recovery activities. Assignment of a particular condition code or placement in one of the DOD's demilitarization accounts does not automatically result in designation of an item as a waste because many of these materials are subjected to recovery, reuse, and recycling activities.[21]

The EPA has postponed final action on whether military munitions on closed or transferred ranges are solid waste until the DOD issues its Range Rule. The Range Rule, which the DOD expects to propose this summer, sets forth a process for addressing unexploded ordnance and other contaminants at these ranges.

Storage Standards

The EPA has finalized two approaches for the storage of waste munitions. The "conditional exemption" approach is available only for the storage of waste military munitions, while the new unit standards under 40 C.F.R. parts 264 and 265,

20. 40 C.F.R. § 266.202(c)(1)-(4).

21. *Id.* § 266.202(a)(1)-(2).

subpart EE, are available to military and nonmilitary handlers of waste munitions and explosives.

The conditional exemption is based on the EPA's determination that the DOD's management practices make it unlikely that these waste munitions will be mismanaged and thereby present a hazard to human health and the environment. The conditional exemption allows nonchemical waste military munitions to exit the traditional RCRA regulatory scheme for hazardous wastes and, instead, be managed under a more tailored set of rules. Chemical munitions and agents are not eligible for the conditional exemption provision.

Additionally, for munitions to qualify for the exemption, they must be subject to the jurisdiction of the DDESB, managed in accordance with the DDESB's published standards (no waivers are allowed), stored in units identified to regulators, and inventoried annually and inspected quarterly. Theft, loss, or violations that may endanger health or the environment must be reported to the regulatory agency.

While a failure to meet any of the previously outlined conditions results in an immediate loss of the exemption, owners or operators may request reinstatement. This conditional exemption will greatly reduce the administrative burdens of storing waste military munitions, while providing regulators with the oversight and accountability they sought.

Under the second approach for storage of waste munitions, the EPA set forth new unit standards in subpart EE of 40 C.F.R. parts 264 and 265, dealing with permitted and interim status facilities. Subpart EE requires that hazardous waste munitions and explosives (military or nonmilitary) be stored in units that minimize the potential for detonation or release; provide a primary barrier to contain the hazardous waste; and, in the case of liquid wastes, provide for secondary containment or a vapor detection system.

The storage unit must be monitored and inspected frequently enough to assure that controls and containment systems are working as designed. The DOD storage units that satisfy the DDESB standards should already meet the unit standards of subpart EE. Unlike the conditional exemption, owners and operators will also have to comply with the RCRA's other subtitle C requirements, including the need to obtain a RCRA storage permit.

The DOD anticipates that subpart EE permits will be sought for units storing waste chemical munitions and agents, as well as for units storing conventional munitions that do not qualify for conditional exemption (e.g., because the storage unit requires a waiver from one or more DDESB standards).

Transportation

In light of the extensive controls that the DOD employs when transporting munitions, the EPA has provided a limited exemption from the RCRA's transportation requirements. A RCRA manifest is not required for shipments of waste munitions and explosives (excluding chemical munitions and agents) between military entities. Such shipments must comply with the DOD shipping controls, including the use of a Government Bill of Lading (GSA SF 1109), Requisition Tracking Form (DD Form 1348), Signature and Talley Record (DD Form 1907), Special Instructions for Motor Vehicle Drivers (DD Form 836), and Motor Vehicle Inspection Report (DD Form 626).

"Military" is defined broadly enough to include the "Armed Services, Coast Guard, National Guard, Department of Energy (DOE), or other parties under contract or acting as an agent for the foregoing, who handle military munitions."[22] The exemption also provides for similar reporting requirements as required under the storage exemption. This limited exemption, however, may be difficult to implement on a widespread scale until states through which such shipments must travel have adopted the provision as part of their state laws and regulations.

The EPA also adopted a second exemption from the transportation requirements which applies to both military and nonmilitary generators and transporters of hazardous wastes, including waste munitions and explosives. The EPA has deleted the requirements for marking and manifesting hazardous wastes transported on a public or private right-of-way within or along the border of contiguous properties under the control of the same person.[23]

While designed to benefit small quantity generators, such as universities seeking to consolidate their hazardous waste activities, the DOD will also benefit. For example, military generators may transport hazardous wastes from one area of an installation to another by using the public highway that bisects the installation.

Emergency Response Activities

The EPA has also clarified long-standing EPA policies regarding the applicability of the RCRA requirements to emergency response activities. These munitions-specific provisions apply both to military and nonmilitary emergency response activities and, therefore, are scattered throughout the regulation.[24] In essence, these provisions codify exemptions from the generator, transporter, and permitting requirements in connection with immediate responses to emergencies involving munitions or explosives.

22. *Id.* § 266.201.

23. *Id.* § 262.20(f).

24. *Id.* §§ 262.10(i), 263.10(e), 264.1(g)(8)(i)(D)(iv), 265(c)(11)(i)(D)(iv), 270.1(c)(3)(i)(D)(iii).

For example, emergency response personnel need not obtain a generator identification number, make a hazardous waste determination, complete a RCRA manifest, mark or label the item, or obtain a regular RCRA treatment permit. A RCRA emergency permit is required, however, in those cases where the emergency response specialist determines that time will allow.

The EPA also made clear in the rule's preamble that emergency response personnel need not be concerned with land disposal restrictions and corrective action requirements. They must maintain records of the actions taken for three years. These exemptions are directed toward relieving emergency response personnel from being distracted by the RCRA's complicated administrative and substantive requirements.

Permit Modifications

The new definition of when munitions become a waste includes munitions that the DOD previously did not view as wastes. The EPA has partially relieved the DOD's concern that existing permitted facilities would be unable to accept these newly designated wastes if their permit or permit application does not specifically allow the receipt of wastes from off-site sources. The rule allows a "grace period" during which the DOD facilities may seek modifications of their permit or permit application to allow receipt of these off-site wastes.

A permit holder may continue to accept waste military munitions despite the absence of such language or inclusion of an explicit restriction on receipt from off-site sources if the facility was already permitted to handle waste military munitions on the effective date of this rule, 12 August 1997; if the permit holder submits, by 12 August 1997, a Class 1 modification request to remove the restriction; and if the permit holder submits a Class 2 modification request by 7 February 1998.

To qualify for the grace period, the modification is limited to removal of the off-site restriction. Other modifications to increase quantities or to accept new waste streams are outside the grace period provision. Because most of the DOD's existing treatment permits are still pending regulatory approval, most modification requests will be to amend the permit application, rather than an actual permit. In these interim status cases, facilities must amend their Part A and B application prior to accepting off-site wastes (i.e., these changes are not subject to the August 1997 and February 1998 deadlines).

While this provision seems to be straightforward, the services remain concerned because the final decision to grant or deny the modification request still rests with the regulator. The DOD is also pursuing a technical amendment to make clear that the grace period also applies to similar modifications to storage permits.

Striking a Balance

The Military Munitions Rule is the result of a concerted effort by the EPA and the DOD to strike a balance between environmental concerns and explosives safety concerns. The Rule, as finally promulgated, clarifies how and to what extent the RCRA's waste management scheme will apply to waste munitions activities. It provides federal and state regulators and the public with the oversight and input to which they have become accustomed in other waste management activities. It also affords the DOD an opportunity to manage its munitions, both product and waste, in a way that is sensitive to environmental concerns while accomplishing its national defense mission. The task now is to work with state and federal regulators to ensure that the rule is implemented consistently in all the jurisdictions in which the DOD has a presence. Lieutenant Colonel Bell.

Harmon Decision Deals Enforcement Blow to Regulated Community

The United States Environmental Protection Agency's Environmental Appeals Board (EAB) recently issued a decision in *In Re Harmon Electronics, Inc.*,[25] which weakened industry's position on three key issues when contesting enforcement actions under the RCRA.

For a fourteen-year period, employees of a Missouri company, Harmon Electronics, illegally disposed of various unused organic solvents by dumping them out the back door of the facility. Harmon management discovered the practice during an internal compliance assessment in November 1987 and ordered it stopped immediately. After assessing the environmental damage caused by the dumping, Harmon self-disclosed the disposal practice to the Missouri Department of Natural Resources (MDNR) seven months later. Because the EPA had delegated hazardous waste permitting and enforcement authority to Missouri, the MDNR inspected the site and entered into negotiations with Harmon. The MDNR concluded that, "because of Harmon's voluntary disclosure and its cooperation in completing work to characterize the site," Harmon would be allowed to enter into a consent decree, rather than face an administrative order with a possible punitive fine.[26] The consent decree contained standard language that it "settled the petition," and that it "shall apply to all persons, firms, corporations, or other entities who are or will be acting in concert and in privity with, or on behalf of, the parties to this Decree . . . ." The EPA Region VII, which retains oversight authority in state RCRA programs, informed the MDNR that Harmon's violations constituted "class I" violations under the EPA's RCRA Enforcement Response Policy. The EPA threatened to overfile MDNR if the latter did not pursue monetary penalties. When the MDNR did not, Region VII filed a four-count complaint against Harmon, proposing a penalty of $2,343,706.

25. *In re* Harmon Elec., Inc., RCRA (3008) Appeal No. 94-4 (EAB, Mar. 24, 1997).

26. *Id.* at 6.

At the administrative hearing in January 1994, the Presiding Officer lowered the penalty to $586,716. Harmon's appeal to the EAB raised, among others, three important issues: (1) whether the Region's overfiled enforcement action was barred by the RCRA and res judicata principles; (2) whether the Region's action was barred by the statute of limitations, since the violations took place more than five years before the enforcement action; and (3) whether the gravity-based portion of the penalty should have been eliminated under the EPA's audit policy, since the violations were self-reported and voluntarily corrected.

The EPA Overfiling State Action

In support of its position on the overfiling issue, Harmon first noted EPA's disregard of the plain language of section 3006 of the RCRA, which provides that authorized state programs operate "in lieu of" the federal program, and that any action by the state under its authorized program "shall have the same force and effect" as actions taken by the EPA. Harmon also observed that, while overfiling is appropriate when the state has taken no enforcement action, the appropriate response when the EPA believes that the enforcement response is inadequate is to withdraw the state authorization.[27] The EAB dismissed these arguments, citing the "well-established reading of the statute" that authorizes the EPA to take action even after a state has already done so.[28]

Harmon's second point in support of its overfiling position was that the Region's enforcement action was barred by res judicata principles. Because the Harmon/MDNR consent decree was signed by a circuit court judge, Harmon argued, the full faith and credit statute[29] required that federal courts give the same preclusive effect to a state court judgment that other state courts would.[30] The EPA countered that it was not in privity with Missouri, and that res judicata principles only apply to claims that have been adjudicated, whereas the present consent decree "resolves no issues of fact or law."[31]

The EAB sided with the EPA, ruling that the state authorization did not itself create privity between Missouri and EPA. The EAB explained that state authorization alone does not ensure an identity of interests for purposes of establishing privity and that privity requires a sufficient identity of interests between the parties—in this case, between a state's enforcement interests and the EPA's.[32] The Board concluded, based on evidence presented, including the fact that Region VII had pressed MDNR to pursue monetary penalties and the latter did not, the MDNR and EPA did not share a sufficient identity of interests.[33] The Board also cited *In re Martin Electronics, Inc.*,[34] in support of the proposition that, even had the identity of Missouri's and EPA's interests been closer aligned in this case, the parties still were not in privity, since the EPA's approval of the state's consent order was not required.

Continuing Violations

In considering the second issue, the EAB conducted a lengthy examination of the precedents construing the 28 U.S.C. § 2462 statute of limitations, under which the government is barred from maintaining an action to enforce a civil fine or penalty unless the action is commenced within five years from "the date when the claim first accrued." The Board explained that a claim "accrues" when the legal and factual prerequisites for filing suit are in place, noting that this occurs at different points depending on the type of case (e.g., a victim's injuries suffered in an auto collision versus long-term health effects in a toxic tort case victim).[35] When the wrongful conduct is of the type that can continue over a period of time, "the violation accrues on the last day conduct constituting an element of the violation takes place."[36] Thus, explained the EAB, the date when a violation accrues is different from the date it first occurs. A civil enforcement action can therefore be maintained "at any time beginning when the illegal course of conduct first occurs and ending five years after it is completed."[37] The Board also cited the plain language of section 3008 of the RCRA, which allows penalties for "per day of noncompliance."

27. *Id.* at 11.

28. *Id.* at 12.

29. 28 U.S.C. § 1738 (1996).

30. RCRA (3008) Appeal No. 94-4, 7 E.A.D. at 13.

31. *Id.*

32. *Id.*

33. *Id.* at 17.

34. 2 E.A.D. 381, 385-86 (CJO 1987).

35. RCRA (3008) Appeal No. 94-4, 7 E.A.D. at 24.

36. *Id.*

37. *Id.* at 26-27.

Application of the EPA Audit Policy

With respect to the third issue, Harmon detected its violations in November 1987 and reported them in June 1988. Because of this good-faith effort, the Presiding Officer reduced the Region's originally proposed multi-day penalty by 66% and increased the downward adjustment for good faith. Although Harmon conceded that it had not met all nine conditions for elimination of the gravity-based portion of the fine set out in the EPA's Incentives for Self-Policing: Discovery Disclosure, Correction, and Prevention of Violations,[38] (Audit Policy) it maintained that it satisfied the "spirit" of the Audit Policy and that the gravity-based penalties assessed should therefore be eliminated. The EAB rejected the "spirit" argument, citing Harmon's failure to recognize that an important aspect of the Audit Policy is to encourage settlement over litigation.[39]

Some point out that Harmon is a poor candidate for an Audit Policy test case,[40] since Harmon's self-disclosure was issued before the final Audit Policy was published, and because Harmon was deemed to be a repeat offender, having engaged in illegal dumping for over fourteen years. But, without specifically holding that a facility would be ineligible to eliminate the gravity-based portion of a penalty unless all nine conditions of the Audit Policy were satisfied, the EAB left a clear impression that the Policy's conditions "are to be respected," making the use of the Audit Policy's penalty reductions in instances of self-reported violations more difficult.[41]

Conclusion

The EAB's ruling in *Harmon* has significant ramifications. First, *Harmon*'s resolute approval of the EPA overfiling of state consent orders—even those approved by the state courts—could force states toward more stringent enforcement responses than they otherwise might have pursued. States will be aware that a *Harmon*-energized EPA will be keeping a close watch on effective enforcement of the delegated hazardous waste program. This more authoritative supervisory relationship could hamper extensive efforts at some installations to nurture congenial relations with their state environmental regulatory agencies. *Harmon* also illuminates some of the differences underlying state and EPA enforcement priorities: while the EPA Region repeatedly cautioned and reproved MDNR for failing to punish the violator through punitive fines, MDNR sought to reward Harmon, through a no-fine consent order, for self-reporting its violations upon discovery and taking predisclosure steps to assess the extent of the contamination. Second, *Harmon's* interpretation of the RCRA's contemplation of when a violation "accrues," and the notion of a "continuing violation" is damaging, because the ruling allows enforcement agencies to stretch a single "act" of noncompliance into a continuous violation. Taken to its logical conclusion, one act of illegal dumping, as in the *Harmon* case, can be penalized as the multiyear operation of an unpermitted hazardous waste disposal facility and can bring an enforcement action any time within five years after the spill is ultimately cleaned or a proper permit is obtained. Finally, the EAB's ruling that compliance with the "spirit" of the Audit Policy would not necessarily be enough to eliminate the gravity portion of an assessed fine further reduces the likelihood that self-reporting a violation would be in a facility's best interests, or that a good-faith report will regularly be rewarded with penalty reduction. Captain Anders.

Application of RCRA to a One-Time Spill

An occasional occurrence during operational training is the accidental release of material such as oil or other fluids. This may be due to a minor leak from a vehicle or a larger spill as the result of a major accident. These materials are usually deposited in places other than the RCRA managed treatment, storage, or disposal facilities, and often on private property.

The RCRA establishes a "cradle to grave" regulatory scheme for the treatment, storage, and disposal of solid and hazardous waste. The intent of Congress throughout the legislative history of the RCRA has been the protection of human health and the environment from the disposal of discarded hazardous waste. Hazardous waste under the RCRA is a subset of solid waste.[42] For a waste to be classified as hazardous, it must first qualify as a RCRA solid waste. Therefore, the starting point in determining the applicability of the RCRA is an examination of the statutory and regulatory definitions of solid and hazardous waste.

The statutory definition of "solid waste" includes: "any garbage; refuse; sludge generated from a treatment plant, water supply treatment plant, or air pollution control facility; and other discarded material."[43] The only category of waste that might describe a spill is "discarded material." The statute does not further define "discarded material."

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38. 60 Fed. Reg. 66,706 (1995).

39. RCRA (3008) Appeal No. 94-4, 7 E.A.D. at 58.

40. *See* TOXICS L. REP., Jan. 22, 1997, at 917.

41. *See also* EPA's Audit Policy Interpretive Guidance, *summarized in* INSIDE EPA, Jan. 24, 1997, at 9-10.

42. 42 U.S.C. § 6903 (1996).

43. *Id.* § 6903(27) (1996).

The EPA's regulations define "solid waste" in the context of the management of hazardous waste under the RCRA subtitle C. The regulations implementing the statute define solid waste as "any discarded material." Discarded material is further defined as abandoned, recycled, or inherently waste-like material.[44] The regulations then specify that materials are solid waste if they are abandoned by being: "(1) disposed of; or (2) burned or incinerated; or (3) accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated."[45]

The subcategory of "hazardous waste" refers to those solid wastes that may: "(A) cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."[46] The EPA's regulatory definition of hazardous waste specifies that a solid waste is a hazardous waste if it is not excluded from the definition and is either specifically listed as hazardous or exhibits a hazardous waste characteristic.[47] The EPA established three hazardous waste lists: (1) hazardous wastes from nonspecific sources, (2) hazardous wastes from specific sources, and (3) discarded commercial chemical products.[48] If a solid waste is not a listed hazardous waste or a mixture of a listed waste and a solid waste, it may still be hazardous if it exhibits a hazardous characteristic. The four hazardous waste characteristics are ignitability, corrosivity, reactivity, and toxicity.[49] The regulatory definition of hazardous waste identifies hazardous wastes for the purpose of subtitle C regulation of these wastes. If a material satisfies the regulatory definition of solid waste and is hazardous under the regulations as either a listed or characteristic hazardous waste, then the comprehensive controls of subtitle C apply. Subtitle C management includes permitting requirements, land disposal restrictions, and technical standards.

The EPA does not consider it within the regulatory or statutory definitions of solid waste when the use of products for their intended purpose results in the deposit of hazardous material on the land. For example, the authorized use of pesticides is not covered by the regulatory scheme of the RCRA. The regulations do not classify as solid waste those commercial products whose use involves application to the land when such products are used in their normal manner. Products applied to the land in their ordinary usage are not "discarded material" subject to waste management regulation.

In determining the applicability of the RCRA to one-time spills during operational activity, the definitions of solid and hazardous waste must be considered. The key issue regarding the applicability of the regulatory definition to spills is whether the material has been "abandoned," as defined in the regulations. When material is spilled in the operation of equipment during normal training, the operator does not "abandon" the material. The focus of the activity is the use of the material, not the disposal of it. The fact that the material ends up in contact with the environment in the same way that wastes do is not dispositive. If the material is collected soon after the spill occurs, the recovered material would be considered solid waste when removed from the site for treatment or disposal.

Even if it can be successfully argued that the spilled material does not fall within the regulatory definition of "solid waste," it may fall within the broader statutory definition. The RCRA regulations clearly state that the regulatory definition of solid and hazardous waste applies only for purposes of implementing subtitle C of the RCRA.[50] In issuing the final rule amending the definition of solid waste, the EPA made it clear that the broader statutory definitions of solid and hazardous waste apply for purposes of enforcing the "imminent and substantial endangerment" provisions of 42 U.S.C. § 7003.[51] The imminent and substantial endangerment provision of the RCRA provides broad remedial authority to address a hazard to health or the environment presented by disposal of solid or hazardous waste. Courts have supported the EPA's position that the regulatory definition of solid waste is narrower than the statutory definition.[52]

The EPA's position is that if products are released into the environment and left indefinitely, they eventually become discarded within the statutory definition of "solid waste." In *Remington Arms*,[53] the United States Court of Appeals for the Second Circuit agreed with the EPA in finding that lead shot

44. 40 C.F.R. § 261.2 (1996).

45. *Id.* § 261.2(b).

46. 42 U.S.C. § 6903(5) (1996).

47. 40 C.F.R. § 261.3(a) (1996).

48. *Id.* §§ 261.31-261.33.

49. *Id.* § 261.20.

50. *Id.* § 261.1(b)(1).

51. 50 Fed Reg. 614, 627 (1985); 40 C.F.R. § 261.1(b)(2) (1996).

52. *See, e.g.*, Connecticut Coastal Fisherman's Ass'n. v. Remington Arms Co., 989 F.2d 1305 (2d Cir. 1993).

and clay targets left in Long Island Sound had accumulated long enough to be considered solid waste.[54] The court did not decide how long materials must accumulate before they are considered discarded. Both the EPA and the courts, however, have concluded that the statutory definition applies only to suits brought to abate an imminent or substantial endangerment to human health or the environment.

Therefore, if a spill is left in place, the spilled materials may be considered "discarded" within the statutory definition of "solid waste," and possibly within the regulatory definition. A failure to respond to a spill of hazardous material could be evidence of an intent to discard. It is unclear at what point in time a spill that has not been cleaned up would be considered a statutorily "discarded" solid waste and therefore subject to section 7003 remedial action or a regulatory solid waste subject to subtitle C regulation. In accordance with the intent of Congress, the EPA applies the broader definition of solid waste for remedial purposes in contrast to regulatory purposes in order to preserve the widest latitude to address imminent threats to human health and the environment. The RCRA's regulatory management requirements are limited to activities that warrant cradle to grave regulation. It is reasonable to construe the definition of solid waste narrowly for regulatory purposes to avoid the imposition of subtitle C requirements.

The specific provisions of the RCRA corrective action program do not apply to one-time spills. Key corrective action provisions found at sections 3004(u) and (v) of the RCRA require the EPA to incorporate corrective action obligations into any permit issued. Section 3008(h) of the RCRA subjects interim status facilities to corrective action authority. These provisions require clean up of any past or present contamination that results from operation of a "solid waste management unit."

The EPA proposed a regulatory framework for implementing corrective action in July 1990 and issued a revised advanced notice of proposed rulemaking in May 1996. In the 1990 proposal, the EPA defined the term "solid waste management unit," or SWMU, to mean, "Any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include an area at a facility at which solid wastes have been routinely and systematically released."[55] An example of this, provided by the EPA, is a loading area where operations result in a small but steady spillage that contaminates the soil over time. In this proposal, the EPA also recognized that not all areas where releases have occurred are considered SWMUs. The proposal specifically indicated that a one-time spill that had been "adequately" cleaned up would not constitute a SWMU. The EPA warned, however, that if the spill is not cleaned up it would be "illegal disposal" and subject to enforcement action.

In the 1990 proposal, the EPA recognized that military firing ranges and impact areas are not SWMUs. Unexploded ordnance fired during target practice is not discarded material since the ordinary use of ordnance includes placement on the land. The EPA cited a United States district court decision,[56] which suggests that materials resulting from uniquely military activities fall outside the definition of solid waste and are not subject to the RCRA corrective action. More recently, in the Military Munitions Rule, the EPA affirmed the proposition that the normal use of munitions in training activities, including the resulting deposit on the land, does not constitute disposal within the meaning of the RCRA.[57]

The EPA recognizes two definitions for both solid and hazardous waste: one definition from the RCRA statute for the purpose of remedial enforcement and one definition found in the regulations for the purpose of the subtitle C management program. Although one-time spills might not be solid waste under the narrower regulatory definition, they may become RCRA statutory wastes if they are left in place and pose an "imminent and substantial endangerment" under Section 7003 of the RCRA. One-time spills are not subject to the more specific corrective action provisions, which require clean up of contamination from SWMUs. In managing our spills, we must adequately clean up the material in a timely manner and reduce the likelihood of a release that may, with the passage of time, be considered "discarded" or pose an "imminent and substantial endangerment." Major Anderson-Lloyd.

Endangered Species Litigation

In a unanimous ruling on 19 March 1997, the United States Supreme Court held that the Endangered Species Act's (ESA) citizens suit provision[58] negates the traditional "zone of interests" test traditionally used to determine standing to bring suits.[59] The Court also held that, for purposes of the Administrative Procedures Act (APA), plaintiffs who suffer economic harm as a result of jeopardy determinations by the United States Fish and Wildlife Service (Service) under the ESA are included

53. *Id.*

54. *Id.*

55. 55 Fed. Reg. 30,798, 30,808 (1996).

56. Barcello v. Brown, 478 F. Supp. 646, 668-69 (D.P.R. 1979).

57. 62 C.F.R. § 6621 (1996).

58. 16 U.S.C. § 1540(g) (1996).

within the zone of interests of affected persons for purposes of standing to bring suit under the APA.[60]

In *Bennett*,[61] ranchers and irrigation districts located within the Bureau of Land Management's Klamath Irrigation Project (Project) challenged a Service Biological Opinion (BO) regarding the effects of Project water levels on two endangered fish species. The Service found that the long-term operation of the Project was likely to jeopardize the fish. The Service then identified reasonable and prudent alternatives that included maintaining minimum water levels in two reservoirs. The petitioners argued that the Service's jeopardy determination violated section 7 of the ESA, and that the BO also had the effect of designating critical habitat without the requisite consideration of economic impacts, in violation of section 4 of the ESA. The suit was brought against the Service, and did not include the Bureau of Land Management. The United States District Court for the District of Oregon dismissed the complaint on the grounds that the plaintiffs did not have standing, since their "recreational, aesthetic, and commercial interests . . . do not fall within the zone of interests sought to be protected by ESA."[62] The United States Court of Appeals for the Ninth Circuit affirmed, holding that the "zone of interests" test limits classes that may bring an ESA challenge under either the APA or the ESA's citizens suit provision.

In overturning the Ninth Circuit, the Supreme Court (quoting the ESA's citizens suit provision, which states that any person may commence a civil suit), held that the zone of interests test does not apply to suits brought under the ESA's citizens suit provision.[63] Further, the Court held, because the petitioners' allegation of economic harm is sufficient to satisfy the requirement that they claim to have been "injured in fact" by the Service's BO (which was found to constitute a final agency action) and because their injury was "fairly traceable" to the BO, the petitioners have standing under Article III.[64] The Court went on to hold that petitioners' claim that the Service failed to perform a non-discretionary function by not considering economic impacts while effectively creating critical habitat, falls under the ESA's citizens suit provision at 16 U.S.C. § 1540(g)(1)(C).[65] With respect to petitioners' claims that the Service violated section 7 of the ESA, the Court found that the ESA's citizens suit provision only includes violations committed by regulated parties.[66] Therefore, since the Service is not a regulated party under this section, the petitioners' section 7 claims, by default, fall under the APA. Applying the zone of interests test to the section 7 claims, the Court found that the economic harm claimed by the petitioners was sufficient to place them within the zone of interests protected by the ESA.[67]

This decision opens the door to a new class of ESA challenges (i.e., those based on economic harm). Furthermore, because many such challenges may now be brought under the APA, the ESA's sixty-day notice requirements will no longer apply, and successful plaintiffs may be able to recover attorneys fees under the Equal Access to Justice Act. Captain Stanton.

Integrated Natural Resources Management Plan (INRMP) Guidance Released

On 21 March 1997, Headquarters, Department of the Army, issued the "Army Goals and Implementing Guidance for Natural Planning Level Surveys (PLS) and Integrated Natural Resources Management Plans (INRMP)" (hereinafter Guidance). In accordance with the Guidance, each installation in the United States with 500 or more acres, and certain OCONUS installations, must complete a PLS and complete and execute an INRMP. The Defense Planning Guidance also established goals to have all PLSs completed by fiscal year (FY) 1998 and to have an approved INRMP for each applicable installation by FY 2000.

The purpose of completing a PLS and an INRMP is to ensure that natural resources conservation measures and Army activities on mission land are integrated and are consistent with federal stewardship and legal requirements. The primary objective of the INRMP, as recognized in the Guidance, is support of the installation operational mission. In the memorandum distributing the Guidance, the Army's Assistant Chief of Staff for Installation Management reinforces the critical relation of an INRMP to mission support: "The availability of training land in the future will be largely determined by what is done

59. Bennett v. Spear, 117 S. Ct. 1154 (1997).

60. *Id.*

61. Id.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

today to properly integrate land use and natural resources management."

Approval of INRMPs

Army Major Commands (MACOMs) review and approve INRMPs. Prior to MACOM approval, the state fish and wildlife agency and the United States Fish and Wildlife Service should concur with the fish and wildlife aspects of the INRMP.[68] Additionally, all aspects of the INRMP that may potentially impact any federally listed threatened or endangered species must be the subject of consultation under section 7 of the ESA.[69] Finally, prior to implementing the INRMP, the installation must fully comply with the National Environmental Policy Act (NEPA) of 1969.

NEPA Compliance

As stated in the Guidance, all installation INRMPs must undergo NEPA analysis in accordance with *Army Regulation 200-2, Environmental Effects of Army Actions* [70] (*AR 200-2*). In most cases, because INRMPs are derived to maintain and to sustain natural resources, production of an environmental assessment (EA) accompanied by a finding of no significant impact (FONSI) should satisfy the requirements of *AR 200-2* and the NEPA. If, however, implementation of the INRMP will significantly impact the environment, then the installation must produce an environmental impact statement (EIS).

When complying with *AR 200-2*, the installation must publish the FONSI and the proposed INRMP for public comment prior to actual implementation. When preparing an EA and a FONSI under *AR 200-2*, the installation has the latitude to use the scoping process to elicit public comments early in the drafting process or may limit the public comment to that period dictated by AR 200-2. A longer public comment period may be beneficial if the installation determines that certain aspects of the INRMP may be controversial. Experience shows that potentially controversial aspects of an INRMP include those portions of an INRMP that determine management of:

(1) guidelines for hunting and fishing programs (access, fees, etc.);

(2) treatment of threatened and endangered species; and,

(3) consumptive uses of natural resources, to include commercial forestry, grazing and agricultural leases, and mining.

The proposed action identified in the NEPA document will normally be implementation of the INRMP. The NEPA document should also include analysis of a reasonable range of alternatives, to include, at a minimum, analysis of the no-action alternative. Analysis of the no-action alternative often serves as a baseline for determining environmental effects. If implementation of the INRMP is potentially controversial, the NEPA document should contain detailed analysis of at least one additional alternative, for example, implementation of an alternative plan to the INRMP—perhaps one of the draft INRMPs or a management plan suggested by an interested group or agency. Major Ayres.

68. Pursuant to the Sikes Act, 16 U.S.C. §§ 670a-670o (1996), the military has authority to enter into cooperative agreements with the Secretary of Interior (United States Fish and Wildlife Service and/or the National Marine Fisheries Service) and state fish and game agencies. Additionally, in accordance with 10 U.S.C. § 2671, the Army must require that all hunting, fishing, and trapping at an installation be held in accordance with state fish and game laws.

69. The Endangered Species Act of 1973, *as amended*, 16 U.S.C. § 1536(a)(2) (1996); *see also* 50 C.F.R. pt. 402, Interagency Cooperation—Endangered Species Act of 1973, as amended (implementing regulations).

70. Dep't of Army, Reg. 200-2, Environmental Effects of Army Actions (23 Dec. 1988).

Claims Report

United States Army Claims Service

Personnel Claims Note

What Constitutes Timely Notice?

As long as a household goods or hold baggage carrier provides a servicemember with a DD Form 1840/1840R at delivery, the carrier is entitled to timely notice of all loss or damage occurring in that shipment. To satisfy this requirement, the carrier must receive the notice of loss or damage within seventy-five days of delivery. Usually, the claimant will list the loss and damage on DD Form 1840R, Notice of Loss and Damage, and submit it to the nearest claims office within seventy days of delivery. The claims office then has five days to review this form and dispatch it to the carrier before the end of the seventy-fifth day. The carrier is then obligated to reimburse the government a predetermined portion of the amount paid to the claimant. If the claims office fails to inform the carrier of the loss or damage within the seventy-five-day notice period, the carrier is not required to reimburse the government. If the lack of notice to the carrier is due to a claimant's failure to timely file, the amount that would have been paid by the carrier to the government will usually be deducted by the government from the amount otherwise payable to the claimant.

The requirement to furnish timely notice to the carrier can be satisfied by any document stating that an item has been damaged in shipment, as long as the carrier receives the document within seventy-five days of delivery. The most commonly used, and easiest to identify, is the DD Form 1840R. But this is not the only method to provide timely notice to the carrier. A copy of DD Form 1841, Government Inspection Report, or a personal letter from the claimant to the carrier may also constitute timely notice.

The United States Army Claims Service (USARCS) recently received a claims file in which a claimant failed to annotate any damaged items on DD Form 1840/1840R. As a result, the field claims office made deductions for lost potential carrier recovery. However, the damaged items were included on the government inspection report (DD Form 1841) that was submitted to the carrier within seventy-five days. The USARCS contacted the carrier and determined that a copy of the inspection report was received within the notice period. As a result, the deductions for lost carrier recovery should not have been made.

If you think that a carrier may have received notice in some form other than DD Form 1840R, before making any deductions for lost carrier recovery, call the carrier and ask for copies of the file. This may prevent the need to process a request for reconsideration. Mr. Fraser and Mr. Lickliter.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATTRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZHA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys Course** 5F-F10

Class Number—133d Contract Attorney's Course **5F-F10**

Class Number—**133d** Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states requiring mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1997

June 1997

2-6 June:	3d Intelligence Law Workshop (5F-F41).
2-6 June:	142d Senior Officers Legal Orientation Workshop (5F-F1).
2 June-11 July:	4th JA Warrant Officer Basic Course (7A-550A0).
2-13 June:	2d RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
9-13 June:	27th Staff Judge Advocate Course (5F-F52).
16-27 June:	AC (Phase II) (5F-F55).
16-27 June:	2d RC Warrant Officer Basic Course (Phase II) (7A-55A0-RC).
22 June-12 Sept.:	143d Basic Course (5-27)C20).
30 June-2 July:	28th Methods of Instruction Course (5F-F70).

July 1997

1-3 July:	Professional Recruiting Training Seminar
7-11 July:	8th Legal Administrators Course (7A-550A1).
23-25 July:	Career Services Directors Conference

August 1997

4-8 August:	1st Chief Legal NCO Course (512-71D-CLNCO).
4-15 August:	139th Contract Attorneys Course (5F-F10).
5-8 August:	3d Military Justice Managers Course (5F-F31).
11-15 Aug.:	8th Senior Legal NCO Management Course (512-71D/40/50).
11-15 Aug.:	15th Federal Litigation Course (5F-F29).
18-22 Aug.:	66th Law of War Workshop (5F-F42).
18-22 Aug.:	143d Senior Officers Legal Orientation Course (5F-F1).

18 August 1997- 28 May 1998	46th Graduate Course (5-27-C22).

September 1997

3-5 September:	USAREUR Legal Assistance CLE (5F-F23E).
8-10 September:	3d Procurement Fraud Course (5F-F101).
8-12 September:	USAREUR Administrative Law CLE (5F-F24E).
8-19 September:	8th Criminal Law Advocacy Course (5F-F34).

3. Civilian-Sponsored CLE Courses

1997

June

6, ICLE	Preparing and Winning a Jury Trial Atlanta, GA
27, ABA	ABA Legal Assistance for Military Personnel (LAMP) Seattle, WA

July

30 July- 2 Aug, AGACL	Death Penalty Litigation and Appeals Conference San Antonio, TX

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS (215) 243-1600
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, D.C. 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center

2020 K Street, NW, Room 2107
Washington, D.C. 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, Va 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of School of Law
Office of Continuing Legal Education
727 Est 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two-year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the November 1996, issue of *The Army Lawyer*.

Current Materials of Interest

1. Web Sites of Interest to Judge Advocates

a. Army Publishing Agency--http://www-usappc.hoffman.army.mil/

This is an excellent site to access and download a plethora of Army Regulations and Publications. The only impediment to accessing the valuable information contained therein is IBM Bookmaster, a viewer program akin to Adobe Acrobat Reader. Before you can begin to access the files on this web site, you will have to download IBM Bookmaster onto your hard drive. In order to do so, you will need to enter a publications account number on your screen which should be available from your publications officer. Taking the trouble to obtain the publications account number or alternatively, having your publications officer download the program for you, will, in the long run, save you much hardship and many trips to your local MOS library.

b. Law Research--http://www.lawresearch.com/index.htm

This web page has an impressive array of legal resource links, indexes, search engines, and directories. It is a great starting point for your legal research of state, federal, and international law. You can also find forms, an attorney directory, and numerous specialty areas such as medical law, bankruptcy, family law, tax law, and immigration law. Great for the legal assistance attorney.

c. Internal Revenue Service--http://www.irs.ustreas.gov/cover.html

Find and download all the tax forms and publications you will ever want at this web site.

d. The State Court Locator--http://www.law.vill.edu/State-Ct/

The State Court Locator is a service provided by the Villanova Center for Information Law and Policy. It contains links to many sites maintained by state court systems on the Internet. If you need to access state law and state court decisions, this Page is highly recommended.

2. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through your installation library. Most libraries are DTIC users and would be happy to identify and order the material for you. If your library is not registered with DTIC, then you or your office/organization may register for DTIC services.

If you require only unclassified information, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218, telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1, fax (commercial) (703) 767-8228, fax (DSN) 426-8228, or e-mail to reghelp@dtic.mil.

If you have a recurring need for information on a particular subject, you may want to subscribe to our Current Awareness Bibliography Service, a profile-based product, which will alert you, on a biweekly basis, to the documents that have been entered into our Technical Reports Database which meet your profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.

Prices for the reports fall into one of the following four categories depending on the number of pages: $6, $11, $41, and $121. The majority of documents cost either $6 or $11. Lawyers, however, who need specific documents document for a case may obtain them at no cost.

You may pay for the products and services that you purchase either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard or American Express credit card. Information on establishing a NTIS credit card will be included in your user packet.

You may also want to visit the DTIC Home Page at http://www.dtic.mil and browse through our listing of citations to unclassified/unlimited documents that have been entered into our Technical Reports Database within the last eleven years to get a better idea of the type of information that is available from us. Our complete collection includes limited and classified documents, as well, but those are not available on the Web.

If you wish to receive more information about DTIC, or if you have any questions, please call our Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1 or send an e-mail to bcorders@dtic.mil. We are happy to help you.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
AD A265777	Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD A263082	Real Property Guide—Legal Assistance, JA-261-93 (293 pgs).
AD A323770	Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (59 pgs).
*AD A313675	Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).
AD A282033	Preventive Law, JA-276-94 (221 pgs).
AD A303938	Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).
AD A297426	Wills Guide, JA-262-95 (517 pgs).
AD A308640	Family Law Guide, JA 263-96 (544 pgs).
AD A280725	Office Administration Guide, JA 271-94 (248 pgs).
AD A283734	Consumer Law Guide, JA 265-94 (613 pgs).
*AD A322684	Tax Information Series, JA 269-97 (110 pgs).AD A276984Deployment Guide, JA-272-94 (452 pgs).

Administrative and Civil Law

AD A310157	Federal Tort Claims Act, JA 241-96 (118 pgs).
AD A301061	Environmental Law Deskbook, JA-234-95 (268 pgs).
AD A311351	Defensive Federal Litigation, JA-200-96 (846 pgs).
AD A255346	Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).
AD A311070	Government Information Practices, JA-235-96 (326 pgs).
AD A259047	AR 15-6 Investigations, JA-281-96 (45 pgs).

Labor Law

AD A323692	The Law of Federal Employment, JA-210-97 (288 pgs).
*AD A318895	The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

Developments, Doctrine, and Literature

AD A254610	Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

Criminal Law

AD A302674	Crimes and Defenses Deskbook, JA-337-94 (297 pgs).
AD A302672	Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).
AD A302445	Nonjudicial Punishment, JA-330-93 (40 pgs).
AD A302312	Senior Officers Legal Orientation, JA-320-95 (297 pgs).
AD A274407	Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).
AD A274413	United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967	Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

AD A145966	Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

a. *The following provides information on how to obtain* Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Administrative Center (PAC).* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions*. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33 you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the

Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

4. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community for Army access to the LAAWS On-Line Information Service, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. *Instructions for Downloading Files from the LAAWS OIS.*

(1) Terminal Users

(a) Log onto the LAAWS OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the

LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

5. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
RESOURCE.ZIP	May 1996	A Listing of Legal Assistance Resources, May 1996.
ALLSTATE.ZIP	January 1996	1995 AF All States Income Tax guide for use with 1994 state income tax returns, April 1995.
ALAW.ZIP	June 1990	*The Army Lawyer*/ *Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA of actual class instructions presented at the school in Word 6.0, May 1997.
CHILDSPT.TXT	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
DEPLOY.EXE	March 1995	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1995.
FOIA.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, November 1995.
FOIA2.ZIP	January 1995	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
ALM1.EXE	September 1996	Administrative Law for Military Installations Deskbook
JA200.EXE	September 1996	Defensive Federal Litigation, March 1996.
JA210DOC.ZIP	May 1996	Law of Federal Employment, May 1996.
JA211DOC.EXE	February 1997	Law of Federal Labor-Management Relations, November 1996.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.
JA231.ZIP	January 1996	Reports of Survey and Line Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, November 1995.
JA235.EXE	January 1997	Government Information Practices, August 1996.
JA241.EXE	January 1997	Federal Tort Claims Act, June 1996.

JA260.ZIP	September 1996	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, March 1993.
JA262.ZIP	January 1996	Legal Assistance Wills Guide, June 1995.
JA263.ZIP	October 1996	Family Law Guide, May 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law guide—Part II, June 1994.
JA267.ZIP	September 1996	Uniform Services Worldwide Legal Assistance Office Directory, February 1996.
JA268.ZIP	January 1996	Legal Assistance Notarial Guide, April 1994.
JA269.DOC	December 1996	Tax Information Series, December 1996.
JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses Protection Act Outline and References, June 1996.
JA275.EXE	December 1996	Model Income Tax Assistance Program, August 1993.
JA276.ZIP	January 1996	Preventive Law Series, December 1992.
JA281.EXE	February 1997	15-6 Investigations, December 1996.
JA280P1.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 1 & 5, (LOMI), February 1997.
JA280P2.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 2, Claims), February 1997.
JA280P3.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), February 1997.
JA280P4.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 4, Legal Assistance), February 1997.
JA285V1.EXE	January 1997	Senior Officer Legal Orientation, February 1997.
JA285V2.EXE	January 1997	Senior Officer Legal Orientation, February 1997.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.

JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 5, March 1996.
JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3,ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA509-1.ZIP	January 1996	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
OPLAW95.ZIP	January 1996	Operational Law Deskbook 1995.
OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996.
OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996.

OPLAW3.ZIP	September 1996	Operational Law Handbook, Part 3, September 1996.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

6. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on the "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK"_files and "ZIP" extension files must reside in the same directory after downloading*. For example, if you intend to use a WordPerfect word processing software application, you can select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP MAY.97.ZIP

At this point, the system will explode the zipped files and they At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, Microsoft Word, Enable).

c. Voila! There is your *The Army Lawyer* file.

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail strongch@otjag.army.mil.

7. Articles

The following information may be useful to judge advocates:

Nathaniel R. Jones, Honorable, *Race and American Juries—The Long View*, 30 CREIGHTON L. REV. 271 (FEBRUARY 1997).

Rodney J. Uphoff, James J. Clark, & Edward C. Monahan, *Preparing the New Law Graduate to Practice Law: A View From the Trenches, 65* U. CIN. L. REV. 381 (Winter 1997).

8. TJAGSA Information Management Items

a. The TJAGSA has upgraded its network server to improve capabilities for the staff and faculty and many of the staff and faculty have received new pentium computers. These initiatives have greatly improved overall system reliability and made an efficient and capable staff and faculty even more so! The transition to Windows 95 is almost complete and installation of Lotus Notes is underway.

b. The TJAGSA faculty and staff are accessible from the

MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil or by calling IMO.

c. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978, extension 435. Lieutenant Colonel Godwin.

9. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. The Army Lawyer will continue to publish lists of law library materials made available as a result of base closures.

b. Law librarians having resources available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.